

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,135

DAVE GREENE, ET AL., *Petitioners*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent

On Petition for Review of Order of the Subversive Activities
Control Board

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JUL 9 1954

Joseph W. Stewart
CLERK

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Filed Mar. 12, 1954

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,135

DAVE GREENE, RUBIN SALTZMAN, ROCKWELL KENT, PETER
SHIPKA, SAM MILGROM, PAULINE OSSIP AND ZEBEDEE
COLLINS, *Petitioners*,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, *Respondent*.

Joint and Several Petition for Review

Dave Greene, Rubin Saltzman, Rockwell Kent, Peter Shipka and Sam Milgrom (herein called the officer-Petitioners), and Pauline Ossip and Zebedee Collins (herein called the member-Petitioners), by their attorneys, jointly and severally petition the Court to review and set aside the order of the Subversive Activities Control Board (herein called the Board) issued on January 14, 1954, in the proceeding before the Board entitled Herbert Brownell, Jr., Attorney General of the United States, Petitioner, v. International Workers Order, Inc., Respondent, No. 103-53.

NATURE OF THE PROCEEDING

The order involved was issued by the Board in a proceeding initiated on April 22, 1953 under Section 13(a) of the Internal Security Act of 1950 (herein called the Act) by a petition of the Attorney General praying that the International Workers Order, Inc., (herein called the IWO) be required to register under Section 7 of the Act as a Communist-front organization. On January 14, 1954, without hearing any evidence, the Board, on motion of the Attorney General, entered its order that the IWO "shall register as a Communist-front organization under and pursuant to Section 7 of the Act".

At the time of the entry of this order, the IWO was in process of being liquidated by, and was under the sole management and control of the Superintendent of Insurance of New York (herein called the Superintendent) pursuant to an order of the Supreme Court of New York which became effective on December 15, 1953. The order of the New York Court was entered in a liquidation proceeding initiated on December 15, 1950 by the Superintendent against the IWO under the insurance laws of New York. From the inception of the New York proceeding until December 15, 1953, when the Superintendent assumed sole control, the IWO was under the complete supervision of the Supreme Court of New York and under the joint management of the Superintendent and the officers of the organization pursuant to an order of the New York Court.

On December 15, 1953, the Supreme Court of New York denied an application of the officers of the IWO for authority to retain counsel to represent the IWO in the proceeding before the Board, which had been set for hearing on December 16, 1953. Thereafter, the Superintendent informed the Board that he would not defend the proceeding before the Board or authorize anyone else to defend it. He further informed the Board that he did not oppose the motion which had been made by the Attorney General for a default order directing the IWO to register as a Communist-front organization.

On December 16, 1953, the officer-Petitioners moved the Board for leave to intervene in and defend the proceeding on their own behalf, as officers and members of the IWO, and on behalf of the other members of the IWO. They urged that they were entitled to intervene as of right for the following reasons:

1. The interests of the officer-Petitioners and the other members of the IWO were not represented in the proceeding.

2. The officer-Petitioners and the other members of the IWO would be bound by an order directing the IWO to

register as a Communist-front organization in the following respects:

a. The officer-Petitioners, as officers of the IWO, would be subject to onerous criminal penalties under sections 7(h) and 15 of the Act in the event of the failure of the IWO to register pursuant to such order.

b. The officer-Petitioners, and other members of the IWO, would be ineligible under sections 5 and 6 of the Act to hold non-elective office or employment under the United States or to apply for, receive or use United States passports.

c. Non-citizen members of the IWO would be ineligible for naturalization under section 23 of the Act and would be deported under section 22 of the Act.

d. Members of the IWO naturalized after January 1, 1951 would be subject to revocation of their citizenship under section 23 of the Act.

3. There was a complete defense on the merits to the Attorney General's petition which the officer-Petitioners were prepared to assert and prove, to wit: That the IWO was not a Communist-front organization as defined in the Act, but, on the contrary, had been under the complete supervision and control of the Supreme Court of New York and the Superintendent since December, 1950.

On January 14, 1954 the Board issued the order involved herein, accompanied by a report. The report took "official notice" that the officer-Petitioners were either active members of the Communist Party or "immersed in Communism". It concluded from this (a) that the officer-Petitioners were not entitled to represent the other members of the IWO in the proceeding, and (b) that under existing federal laws and regulations, the officer-Petitioners were already subject to or "in jeopardy of" all of the sanctions which a registration order against the IWO would impose upon them as members of that organization.

The report further found that the officers-Petitioners would not be liable to criminal penalties in the event of the failure of the IWO to register pursuant to a registration order. Upon these grounds, the report denied the motion of the officer-Petitioners for leave to intervene.

The accompanying order of the Board, ordering the IWO to register as a Communist-front organization, recited that it was issued under section 13(d) of the Act. That Section provides that where a respondent in a proceeding before the Board declines or fails to appear at a hearing accorded to it, "the Board may without further proceedings and without the introduction of any evidence, enter an order" requiring such respondent to register as a Communist organization under section 7 of the Act.

On February 1, 1954, the member-Petitioners moved the Board (a) to permit them to intervene and defend the proceeding on their own behalf and on behalf of all other members of the IWO, (b) to vacate the registration order of January 14, 1954, and (c) to set the proceeding down for hearing pursuant to section 13(c) of the Act.

Affidavits filed in support of these motions stated that the member-Petitioners were members of the IWO, were not members of the Communist Party, and were eligible for federal employment and passports. The affidavits further stated that the member-Petitioners did not learn of the refusal of the Superintendent to defend the proceeding or of the Board's order of January 14, 1954 until January 18, 1954 or thereafter. The affidavits further stated that unless the Board granted the relief requested, the member-Petitioners and other citizen-members of the IWO would be subject to the sanctions of sections 5 and 6 of the Act with reference to federal employment and passports, and that non-citizens and naturalized citizens among the members of the IWO would be subject to the sanctions of sections 22 and 23 of the Act with reference to naturalization, deportation and revocation of citizenship. The affidavits further asserted the same matters

urged by the officer-Petitioners with reference to the absence of any representation of IWO members in the proceeding and the existence of a complete defense to the Attorney General's petition.

None of the allegations of the affidavits were controverted by the Attorney General.

On March 4, 1954 the Board issued a memorandum opinion and order denying the motions of the member-Petitioners. The memorandum ruled that the member-Petitioners were not entitled to represent the other members of the IWO as a class. It denied intervention to the member-Petitioners on their own behalf on the grounds (a) that they did not allege that they had applied for federal employment or passports, or intended to do so, and (b) that their eligibility for federal employment or passports "is highly questionable" because the New York courts had found that the IWO was Communist controlled. Additionally, as grounds for the Board's action, the memorandum opinion suggested that the motions of the member-Petitioners were not timely filed and that the member-Petitioners made no showing that they were in possession of evidence sufficient to establish the defense which they asserted.

JURISDICTION AND VENUE

Jurisdiction and venue exist in this Court by virtue of the following:

1. Section 14 (a) of the Act, which provides:

"The party aggrieved by any order entered by the Board under subsections (g), (h), (i) or (j) of section 13 may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside."

2. Section 13 (g) of the Act, which provides:

"If, after hearing upon a petition filed under subsection (a) of this section, the Board determines (1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served upon such organization an order requiring such organization to register as such under section 7 of this title; . . ."

3. Section 2 (b) of the Administrative Procedure Act (which act is made applicable to proceedings under the Act by section 16 of the latter), which provides:

". . . 'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party in any agency proceeding . . ."

4. Section 10 of the Administrative Procedure Act, which provides:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion:

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute . . ."

GROUND S FOR RELIEF

The Petitioners, jointly and severally, seek to have the order of the Board set aside on the following grounds:

1. The Board erred in finding that neither the officer-Petitioners nor the member-Petitioners were entitled, as

of right, to be admitted as parties to the proceeding, in denying their motions for leave to intervene, in entering the order involved herein, and in refusing to vacate that order.

2. The action of the Board in denying Petitioners' motions for leave to intervene, in entering an order under Section 13 (d) (2) of the Act ordering the IWO to register as a Communist-front organization, and in refusing to vacate that order, violated sections 5, 6, 7, and 2 of the Administrative Procedure Act and the Fifth Amendment to the Constitution.

3. The order of the Board was not authorized by Section 13 (d) (2) of the Act.

4. Section 13 (d) (2) of the Act, as construed and applied by the Board, denied Petitioners due process of law.

5. The findings of the Board (on which its denial of Petitioners' motions for leave to intervene was predicated) that the Petitioners would not be adversely affected by an order directing the IWO to register as a Communist-front organization:

- a. Were erroneous as a matter of law;
- b. Were not supported by the Board's findings as to the facts, and
- c. Were made in violation of section 7 of the Administrative Procedure Act and the Fifth Amendment to the Constitution for the reason that they were based on supposed facts which were not the subject of evidence before the Board, do not appear in the record before the Board, were not proper subjects for official notice, and which Petitioners were never afforded an opportunity to rebut.

6. The Board erred in ruling that the motion of the member-Petitioners was not timely filed.

7. The Board erred in ruling that the member-Petitioners were required to show, as a condition of their right to intervene, (a) that they had applied or intended to apply for federal employment or passports, or (b) that they were in possession of sufficient evidence to prove the defense asserted by them.

8. The Board erred in ruling that neither the officer-Petitioners nor the member-Petitioners were entitled to represent the other members of the IWO as a class in the proceeding.

9. The order of the Board was contrary to the undisputed facts which were brought to the attention of the Board and which established that the IWO was not a Communist-front organization at the time the order was entered.

RELIEF PRAYED

Wherefore, the Petitioners pray that the Court set aside the aforesaid order of the Board.

Respectfully submitted,

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11 Park Place
New York, New York

JOSEPH FORER
Joseph Forer
711 14th Street, N. W.
Washington, D. C.
Attorneys for Petitioners.

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UNITED STATES OF AMERICA
SUBVERSIVE ACTIVITIES CONTROL BOARD
Washington, District of Columbia

Docket No. 103 53

In the matter of:

HERBERT BROWNELL, JR., ATTORNEY GENERAL
OF THE UNITED STATES,

v.

THE INTERNATIONAL WORKERS ORDER, INC., *Respondent*.

Entry of Appearance

The undersigned, being duly admitted to practice (or having applied for admission to practice), before the Subversive Activities Control Board as Attorney, herewith enters his appearance for the respondent The International Workers Order, Inc. in the above-entitled proceeding.

Dated: May 28, 1953

ARTHUR KINOY
(Signed)
Arthur Kinoy
(Type signature)
104 East 40th Street
(Office address)
New York 16, New York
(City and state)

* * * * *

527 IN THE SUBVERSIVE ACTIVITIES CONTROL BOARD

No. 103-53

HERBERT BROWNELL, JR., ATTORNEY GENERAL
OF THE UNITED STATES, *Petitioner*

v.

THE INTERNATIONAL WORKERS ORDER, INC., *Respondent*.

On Petition for an order requiring the International Workers Order, Inc., to register with the Attorney General as required by Section 7 (b), (c) and (d) of the Internal Security Act of 1950.

First Amended Petition

The Attorney General respectfully represents to the Subversive Activities Control Board that the International Workers Order, Inc., was required under Section 7 (b), (c) and (d) of the Internal Security Act of 1950 (here-
528 inafter referred to as the Act) to register and file a registration statement with the Attorney General on or before October 23, 1950, as a Communist-front organization and that it failed to do so and continues to fail to do so. Pursuant to Section 13(a) of the Act, therefore, the Attorney General petitions this Board for an order, after appropriate proceedings, directing the International Workers Order, Inc., to register with the Attorney General as a Communist-front organization in the manner required by the Act.

In support of this petition, the Attorney General alleges the following facts, based on information and belief, relating to the character of the International Workers Order, Inc., as measured by the standards specified in the Act.

I

From in or about 1930 up to and including the date of filing this petition, there has existed in the United States

an organization known as the International Workers Order, Inc., (hereinafter referred to as the "IWO" or "organization"). The IWO was incorporated in 1930 as a fraternal benefit society under the laws of the State of New York. This organization has been and is composed of large numbers of members and affiliates who function through nationality sections, state, county, city, lodges and other units, which are subject to the supervision and control of the national office of the IWO.

II

From in or about 1919 up to and including the date of filing this petition, there has existed in the United States an organization known by various names and which is now known as the Communist Party of the United States of America (hereinafter referred to as the Communist Party).

The Communist Party is not now and has not been a diplomatic representative or mission of a foreign government accredited as such by the United States Department of State.

The Communist Party has been and is substantially directed, dominated and controlled by the government and Communist Party of the Soviet Union, and by the foreign organization controlling the world Communist movement, such foreign organization being known at various times as the Communist International and the Communist Information Bureau. Throughout its existence the Communist Party has operated and continues to operate primarily to advance the objectives of the world Communist movement which was organized by the Soviet Union and which has as its primary objective the establishment of Communist dictatorships of the Proletariat in all countries throughout the world, including the United States, and the direction, domination and control of this movement is vested in and exercised by the Soviet Union.

The policies of the Communist Party are formulated and carried out, and its activities are performed, pursuant to directives of, and to effectuate the policies of, the Soviet Union, which directs and controls the world Communist movement.

The views and policies of the Communist Party do not deviate from the views and policies of the Soviet Union.

The Communist Party has received financial aid from or at the direction of the Soviet Union.

530 The Communist Party has sent its members and representatives to the Soviet Union for instruction and training in the principles, policies, strategy and tactics of the world Communist movement.

The Communist Party reports its program, activities and affairs to the Soviet Union.

The principal leaders of the Communist Party and a substantial number of its members are subject to and recognize the disciplinary power of the Soviet Union.

The Communist Party engages in secret practices for the purpose of promoting its objectives and concealing its direction, domination and control by the Soviet Union.

The principal leaders of the Communist Party and a substantial number of its members consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union.

The Communist Party has been found by this Board to be a Communist-action organization.

Therefore, the Communist Party has been and is a Communist-action organization as defined by Section 3(3) of the Act.

III

Throughout its existence, the IWO has been and is substantially directed, dominated and controlled by the Communist Party and has been and is primarily operated for the purpose of giving aid and support to the Communist Party. Pursuant to Section 13(f) of the Act,

the following facts are respectfully submitted for
531 the consideration of the Board as illustrative of the
above.

(1) From the inception of the IWO up to and including the date of the filing of this petition, persons who have been active in the management, direction and supervision of the IWO, have been and are now active in the management, direction and supervision of, and as representatives of, the Communist Party. Through these persons the Party has guided and directed and continues to guide and direct the internal affairs and formulation of the policies of the IWO. The following facts, among others, are illustrative of the above:

(a) In or about 1929, the Communist Party decided to create a fraternal benefit society which was to include the left-wing elements of two fraternal benefit societies, the Workmen's Circle and the Independent Workmen's Circle. This organization subsequently became known as the International Workers Order.

(b) In or about 1929, the decision of the Communist Party to create a fraternal benefit society in the United States, which subsequently became known as the IWO, was considered and approved by the Communist International in Moscow.

(c) The decision of the Communist Party to create such a fraternal benefit society was carried out in or
532 about 1930 when the IWO was organized and incorporated under the laws of the State of New York.

(d) Most of the incorporators signing the Certificate of Incorporation for the IWO, filed with the State of New York, were leaders, members and representatives of the Communist Party.

(e) Most of the officers and members of the leading governing bodies of the IWO were leaders, members and representatives of the Communist Party.

(f) The Communist Party has exercised control over the selection and removal of officers of the IWO.

(g) IWO officers who are members of the Communist Party have been under the disciplinary authority of the Communist Party.

(h) Controversies arising between officials of the IWO as to the execution of the program and policies of the organization have been presented for resolution to the Communist Party.

(i) The program, policies and affairs of the IWO have been directed, dominated and controlled by the Communist Party by such means as a device known as a "Communist Party Fraction", operating within the various units of the IWO.

(j) The program, policies and affairs of the IWO have been discussed in meetings of various
533 Communist Party committees, both on a national and local scale, and decisions made in such committee meetings have been transmitted to the organization for execution.

(k) The Communist Party has assigned its leaders, members and representatives to organize, work in, promote, expand and strengthen the IWO.

(l) Youth sections of the IWO, consisting of persons who have not attained an age rendering them eligible for membership in the organization, have been organized at the direction of the Communist Party and have been under the supervision, direction and control of the Communist Party.

(m) IWO officers have been required to submit reports to the Communist Party on the program, policies and affairs of the organization.

(n) IWO schools and summer camps have been under the supervision, direction and control of the Communist Party.

(2) From its inception to the date of the filing of this petition, the IWO has received and continues to receive support, financial and otherwise, from and at the direction of the Communist Party, as illustrated by the following facts, among others:

(a) The Communist Party organized, incorporated and established the IWO.

534 (b) The Communist Party instructed its representatives to assist the IWO to obtain a charter to operate in various States in the United States.

(c) The Communist Party has furnished the leadership for the IWO.

(d) The Communist Party has instructed its leaders, members and representatives to join the IWO.

(e) The Communist Party has directed its leaders, members and representatives to organize new sections, districts, lodges and other units for the IWO.

(f) The Communist Party has directed its leaders, members and representatives to recruit members for the IWO.

(g) The Communist Party has furnished speakers and lecturers for IWO meetings.

(h) The Communist Party has furnished instructors for IWO schools.

(i) The Communist Party, through its newspapers and periodicals, has publicized and supported the activities and affairs of the IWO.

(j) Communist Party schools have been utilized to instruct students in the program and activities of the IWO.

(k) The Communist Party has assisted the IWO in organizing the Youth Section of the organization.

535 (1) The Communist Party has contributed to the financial support of the IWO by paying the membership dues for certain IWO members.

(m) The Communist Party has supervised the financial affairs of various units of the IWO.

(n) The Communist Party has assisted the IWO in the distribution and circulation of the organization's literature.

(o) The Communist Party has assisted the IWO in organizing various mass meetings of the organization.

(p) The Communist Party has assisted the IWO in planning and supervising fund raising and other types of campaigns conducted by the organization.

(3) Throughout its existence, the IWO has been and is operated for the purpose of giving aid and support to the Communist Party and its funds, resources and personnel have been and are used for the purpose of furthering and promoting the objectives of the Communist Party, as illustrated by the following facts, among others:

(a) The IWO has sold, distributed, circulated and displayed Communist Party literature.

(b) The Communist Party has used the meeting halls, buildings, offices and other facilities of the
536 IWO for meetings, conferences, schools, election campaign headquarters, and other activities.

(c) To promote and advance the spread of Communist party principles, the IWO encouraged its members to attend Communist Party schools and paid the expenses incurred by such members while attending the school.

(d) To promote and advance the spread of Communism, the members of the IWO have enrolled their children in schools where the aims and principles of the Communist Party were taught by Communist Party instructors.

(e) The leaders and members of the IWO have recruited members for the Communist Party.

(f) The recreational facilities of the IWO have been made available for the use of Communist Party members.

(g) The IWO has conducted letter-writing and other types of campaigns to influence legislative and other actions on issues sponsored by and of interest to the Communist Party.

(h) The IWO has sponsored meetings and rallies to aid and assist the Communist Party and to promote the aims and principles of the Communist Party.

(i) The IWO has functioned as a "transmission
537 belt" which serves as a propaganda outlet for the dissemination of the aims, principles and policies of the Communist Party.

(j) The IWO has actively participated in campaigns of Communist Party candidates for public office.

(k) The IWO has circulated nominating petitions for Communist Party candidates for public office.

(l) The IWO has contributed funds and its members have participated in May Day Demonstrations which were sponsored by the Communist Party.

(m) The IWO has made direct monetary contributions to the Communist Party.

(n) The IWO has contributed to the financial support of the Communist Party by paying excessive rates for advertising space in Communist Party newspapers and periodicals.

(o) The IWO has participated in campaigns conducted by the Communist Party to raise funds for the support of, and to increase the circulation of, Communist Party newspapers and periodicals.

(p) IWO funds have been used to defray the expenses of Communist Party leaders while traveling in connection with Communist Party activities.

538 (q) The IWO has contributed funds for the defense of Communist Party leaders and members brought before the courts and administrative agencies of the United States.

(4) Throughout its existence, the IWO never knowingly has deviated from the views and policies advanced by the Communist Party. The IWO has advocated and followed the views and policies of the Communist Party in the following instances, among others:

(a) The IWO supports and acclaims the policy of the Communist Party calling for the defense of the Soviet Union. In implementation thereof, the IWO advocates that the Soviet Union is the workers fatherland which all members are obliged to support and defend under all circumstances.

(b) Except when the United States and the Soviet Union were potential or actual military allies, the IWO supported the Communist Party policy which advocates the view that the United States is an imperialistic power bent on instigating wars for world domination, and that the Soviet Union and other Communist nations are the only
539 true democracies which seek to preserve peace.

(c) The IWO supports the views of the Communist Party which endorsed and justified the trial and execution of a large number of prominent Russian military and political leaders by the Soviet Union in the "Purge" of 1937.

(d) The IWO supported the views of the Communist Party which endorsed and justified the position of the Soviet Union in the Russo-Finnish War in 1939.

(e) The IWO endorsed the position of the Communist Party which supported the Loyalist forces in the Spanish Civil War and opposed the position of the Government of the United States as a neutral and urged the lifting

of the arms embargo imposed by the United States against Spain.

(f) The IWO, in line with the position taken by the Communist Party, supported and justified the territorial expansion of the Soviet Union through the conquest of Polish territory in 1939.

(g) Commencing in or about 1935, the IWO, in line with the position taken by the Communist Party, advocated a program of united front action to combat Fascism
540 and Nazism. After the Hitler-Stalin Non-Aggression Pact was consummated on August 23, 1939, the IWO followed the Communist Party position and overlooked its opposition to Fascism and Nazism and supported the Hitler-Stalin Pact.

(h) During the period from the signing of the Hitler-Stalin Pact to June 21, 1941, the IWO followed the Communist Party position which characterized the war between the Western European powers and Germany and Italy as an "unjust" imperialist war and affirmatively sought to prevent American aid from being given to the Western European nations.

(i) Coincident with the German attack on the Soviet Union on June 22, 1941, the IWO, in line with the position taken by the Communist Party, abruptly reversed its position by characterizing the war as a "just" war against Fascism requiring the support of all members and demanded that the United States give full aid and assistance to the nations opposing Nazi Germany and Italy.

(j) In the period following the termination of hostilities in World War II, the IWO, in line with the position
541 taken by the Communist Party, consistently supported the policies and tactics of the Soviet Union and the Communist Parties in Rumania, Bulgaria, Hungary, Albania, Poland and Czechoslovakia in their efforts to obtain control of the governments of those countries

and, since the success of such efforts, the IWO has vigorously supported the conduct and policies of those Communist governments.

(k) Since the end of World War II, the IWO followed the position taken by the Communist Party and supported the Chinese Communists in their violent revolution against the legal Government of China, and, since the success of such efforts, the IWO and the Communist Party have vigorously supported the conduct and policies of the Communist government of China.

(l) The IWO followed the position taken by the Communist Party and supported the violent revolutionary efforts of the Communist guerillas in Greece and opposed American aid to Greece and Turkey in 1947.

(m) In the period following the termination of hostilities in World War II, the IWO, in line with the position taken by the Communist Party, supported the efforts of the Soviet Union to prevent the successful establishment and maintenance of the Government of Western Germany
542 and supported the Soviet blockade of Berlin in 1948.

(n) Since the end of World War II, the IWO, in line with the position taken by the Communist Party, has opposed those facets of American foreign policy which it regards as inimical to the interest of the Soviet Union, such as the program for aid to Greece and Turkey, the European Recovery Program and the North Atlantic Pact.

(o) The IWO, following the position taken by the Communist Party, supported the Communist Government of Yugoslavia when that Government collaborated with the Soviet Union and the Communist Information Bureau, and it has opposed and condemned the Yugoslavian Government since its defection from the Soviet Union and the Communist Information Bureau.

(p) The IWO, in line with the position taken by the Communist Party, opposed and condemned the position

taken by the Government of the United States in its opposition to the Communists in the Italian elections of 1948.

(q) From the time the scheme was first launched by the Communist Information Bureau, the IWO, following the position taken by the Communist Party, has rendered unqualified support to the peace campaign of the World Partisans of Peace and the Stockholm Peace Petition.

(r) The IWO followed the position taken by the Communist Party and supported the invasion of the Republic of South Korea by the government of North Korea and has opposed the actions of the United States and the United Nations in defending South Korea, and it now supports the intervention of the Chinese Communists in the Korean conflict.

Respectfully submitted,

HERBERT BROWNELL, JR.
Herbert Brownell, Jr.,
Attorney General

WARREN OLNEY III
Warren Olney III,
Assistant Attorney General

WILLIAM E. FOLEY
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Malcolm F. Knight

OLIVER J. BUTLER, JR.
Oliver J. Butler, Jr.

Attorneys,
Department of Justice

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Verification

Washington, District of Columbia ss.:

HERBERT BROWNELL, JR., being duly sworn, deposes and says:

I am the petitioner above named. I have read the foregoing first amended petition and know the contents thereof. The matters alleged are based on information and belief, and I believe them to be true. The sources of my information and the grounds of my belief are the investigative reports made by the Federal Bureau of Investigation with reference to the International Workers Order, Inc.

HERBERT BROWNELL, JR.
Herbert Brownell, Jr.

Sworn to before me this 21 day of Aug., 1953.

.....

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**First Amended Answer Pursuant to Order
of Board**

THE RESPONDENT INTERNATIONAL WORKERS ORDER, INC.,
FOR ITS FIRST AMENDED ANSWER TO THE PETITION OF
THE ATTORNEY-GENERAL STATES:

I. Respondent International Workers Order, Inc., states to the Subversive Activities Control Board that the International Workers Order, Inc. was not required under Section 7(b), (c) and (d) of the Internal Security Act of 1950 hereinafter referred to as "the Act" to register and file a registration statement with the Attorney-General on or before October 23, 1950 as a "communist front organization" for the following reasons, *inter alia*:

a. Sections 1 through 17 inclusive of Title I, of the Act of 1950 as well as Sections 22, 23 and 25 therein, are unconstitutional on its face, as construed, and as applied, in that they are violative of the First Amendment to the Constitution of the United States.

b. Sections 1 through 17 inclusive of Title I, of the Act as well as Sections 22, 23 and 25 therein, are unconstitutional on its face, as construed, and as applied, in that they are violative of the Fifth Amendment to the
589 Constitution of the United States.

c. Sections 1 through 17 inclusive of Title I, of the Act as well as Sections 22, 23 and 25 therein, are unconstitutional on its face, as construed, and as applied, in that they are violative of the Sixth Amendment to the Constitution of the United States.

d. Sections 1 through 17 inclusive of Title I, of the Act as well as Sections 22, 23 and 25 therein, are unconstitutional on its face, as construed, and as applied, in that they are violative of the Eighth Amendment to the Constitution of the United States.

e. Sections 1 through 17 inclusive of Title I, of the Act as well as Sections 22, 23 and 25 therein, are unconstitutional on its face, as construed, and as applied, in that they are violative of the Ninth Amendment to the Constitution of the United States.

f. Sections 1 through 17 inclusive of Title I, of the Act as well as Sections 22, 23 and 25 therein, are unconstitutional on its face, as construed, and as applied, in that they are violative of the Tenth Amendment to the Constitution of the United States.

g. Sections 1 through 17 inclusive of Title I, of the Act as well as Sections 22, 23 and 25 therein, are unconstitutional on its face, as construed, and as applied, in that they are violative of Article I, Section 9, Clause 3 of the Constitution of the United States.

h. Sections 1 through 17 inclusive of Title I, of the Act as well as Sections 22, 23 and 25 therein, are un-
590 constitutional on its face, as construed, and as applied, in that they are violative of Article III, Section 1 of the Constitution of the United States.

i. The respondent IWO is not a "communist front organization" within the meaning of the Act.

II. Respondent further answers to the allegations contained in the petition of the Attorney-General as follows:

a. Respondent admits that from 1930 up to and including the date of filing of the petition that there has existed in the United States an organization known as the International Workers Order, Inc., (hereinafter referred to as respondent, or IWO.) The IWO was incorporated in 1930 as a fraternal benefit society under the laws of the State of New York. The IWO has been and is composed of large numbers of members who belong to lodges and/or nationality societies. Respondent denies that these lodges and nationality societies "are subject to the supervision and control of the National Office of the IWO" except as specified in the National Constitution of the respondent, a copy of which is attached, hereto, as Exhibit A.

b. In respect to the allegations contained in Paragraph II of the petition, the Board has held that the allegations therein may not be sufficient "for the purpose of litigating *de novo* in this proceeding the question whether the Communist Party of the United States is a communist action organization within the meaning of the Act". The Board has further held that "on the other hand, however, petition is sufficient if the Attorney-General proposes to rely

591 upon a valid method of presentation which will not require the litigation *de novo* of the character or status under the Act of the Communist Party. The memorandum opinion of the Board of September 18th further states that the petitioner's position is that he "will establish the allegations in the First Amended Petition by valid legal means at the proper time and place." Under these circumstances the respondent is unable to plead to the allegations set forth in Paragraph II other than to state that it is without sufficient information, knowledge or belief to plead to the allegations set forth in Paragraph II.

c. In respect to the allegations contained in Paragraph III of the petition the respondent denies that it has been or is substantially directed, dominated and controlled by

the Communist Party or that it has been or is primarily operated for the purpose of giving aid and support to the Communist Party. Moreover, respondent states that from December 15th, 1950 up to and including the present date, respondent has been operated under the joint management of the officers of the respondent and the Superintendent of Insurance of the State of New York pursuant to an order of the Supreme Court of the State of New York.

d. As to the allegations of fact contained in sub-divisions 1 through 3 of Paragraph III of the petition, respondent declines to reply thereto, on the basis of rights, privileges and immunities granted by the Constitution of the United States and the Bill of Rights, and in particular, the right of freedom of speech, press and assembly guaranteed by the First Amendment to the Constitution of the United States, the privilege not to testify against oneself contained in the Fifth Amendment to the Constitution of the United States and the rights reserved to the states and the people of the United States under the Ninth and Tenth Amendments of the United States Constitution, all as set forth in the affidavit of verification attached hereto.

e. Respondent denies the allegations of fact contained in sub-division (4) of Paragraph III of the petition. Respondent has from time to time taken various positions on matters of concern to its membership but denies that these positions were adopted "in support of" or "in line with" the interests of any group other than the membership of the International Workers Order as set forth fully in Paragraph III of this answer.

593 III. As a further and affirmative defense to the petition of the Attorney General the respondent states as follows:

The International Workers Order is a legally constituted fraternal benefit society which has operated successfully for over twenty years and provided low-cost insurance and sick benefits, and has made it possible for its

members to secure funeral and cemetery services and low-cost medical care, as well as providing social, recreational and educational activities for its members.

The International Workers Order was organized by over 5,000 members during the years of the depression, when low-cost insurance adapted to the workers' pocketbook was a necessity. It came into existence when thousands of workers could not afford and thus dropped the premium payments of insurance, and established the step rate system of insurance more adaptable to the needs of the workers. That such need was there can be attested to by the rapid growth of the organization from 5,000 to 180,000 members.

One of the important features of the International Workers Order is fraternalism based on an interracial organization and unity of the nationality groups—to strengthen American democracy. The International Workers Order was a pioneer of this concept of equality through unity in the fraternal movement of America.

The General Council of the International Workers Order reiterated the aims and purposes of the International
594 Workers Order in the following Declaration of Policy:

“The International Workers Order is organized for the purpose of providing insurance benefits and advancing the mutual protection, health, cultural, educational and recreational interest and well-being of its members, Negro and white, Jew and Gentile, native born and foreign born, alike and equal.

“The interracial, multi-national composition of the Order makes it a truly representative American fraternal organization dedicated to the principles of brotherhood, security and equality, with sole allegiance to the United States of America. The Order supports all efforts for the achievement of a better life for the workers and common people of our country through peaceful and democratic methods, and reaffirms its opposition to the use of force and violence against the government, the democratic institutions of

our country, the people, racial and national groups, organizations or individuals.

“The International Workers Order reaffirms its belief in the democratic institutions of our country and the sacred principles of the equal rights of man embodied in the Constitution and the Bill of Rights. We will strive together with all the people of the United States to promote and advance the peace, security and freedom of our country.”

The charter of fraternal organizations provides that the organization must function on a democratic basis, through self-government and open to all without any discriminatory features. The International Workers Order has constantly lived up to this basic principle. The Constitution of the International Workers Order provides that everybody irrespective of race, nationality and political belief can join the IWO. The membership application requires only the necessary insurance information. Thus
 595 thousands of workers, regardless of political beliefs, joined the Order and found within the Order their expression of fraternal needs. Furthermore, the lodges which, according to the law, must meet regularly are independent, democratically run organizations. They elect their officers on the basis of democratic election, without regard to race, color, creed or political belief. The only concern of the lodge is to elect officers who will serve the interests of the membership. At regularly constituted conventions the General Council and officers are democratically elected. Thus the whole democratic process of elections as well as the right of the lodges to make their own decisions, is the guarantee that the IWO is controlled only by its membership.

The democratic fraternal character of the organization as an order serving its membership is attested to by the fact that it has always been financially sound and solvent, with an average solvency rating of 140%, and has paid out over \$17,000,000 in life insurance and sick benefits, and has an accumulated reserve of over \$7,500,000.

The truly fraternal organizations in America resisted the pressures exerted to abandon their fraternal principles and to transform themselves into commercial insurance companies. The main feature which these fraternal always guarded was the democratic right to participate in the civic life of the nation expressed in their constitutional right to take positions on civic issues, as they see fit, according to their own understanding. The IWO like any

596 other fraternal organization conducted its activities with the sole purpose in mind of being a helpful partner in strengthening American democracy, and thus expressed itself on many issues of the day. The IWO always took its own independent position, based on the needs and interests of its membership. It would render meaningless the right of expression if an organization before adopting a position would fear to do so if any other organization, Communist or non-Communist, might have a similar position. Such an approach would strangle free expression.

The IWO has always taken positions on issues of the day affecting the welfare of its membership. This civic concern is a proud contribution of the IWO to the life of the nation. Democratic procedures in our country requires that the organizations of the people express themselves. Often presidents, to check their own actions, have asked peoples' organizations to express themselves on basic issues. Social Security would not exist if the people's organizations had not expressed themselves in support. So with issues and actions affecting peace and the well-being of the nation. To make the argument that the IWO supported legislative measures which may or may not have been supported by the Communist Party is an attempt to censor the right of peaceful petition of the government. To condemn an organization because it may have been critical of the Government's position on specific issues makes a mockery of democratic procedure and is an official approval of McCarthyism.

597 When the IWO took positions on basic issues of the day it expressed them within the framework of the democratic guarantees and practices of our country. The IWO always rejected force and violence and has opposed all elements who advocate forceful overthrow of the government. The IWO has consistently fought for the democratic principles as expressed in the Constitution of the United States and the Bill of Rights.

The IWO in rejecting the accusation of the Attorney General will defend itself and its loyal membership against these new attacks. We feel that by doing so we are defending the Bill of Rights with its guarantees of free association and free expression for all. In so doing the IWO will make an important contribution to the fight for the maintenance of democracy in America, against creeping fascism.

Submitted by Respondent,

INTERNATIONAL WORKERS ORDER, INC.

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Verification

DAVE GREENE, being duly sworn, deposes and says:

I am the General Recording Secretary of the above named respondent. I have read the foregoing answer to the Petition and know the contents thereof. The matters set forth therein are true to the best of my knowledge, information and belief. In respect to the matters alleged in Paragraph III of the Petition, sub-paragraphs 1 through 3, I decline to respond thereto on the ground of my rights under the Constitution of the United States and the Bill of Rights, and in particular, the right of freedom of speech, press and assembly guaranteed by the First Amendment to the Constitution of the United States, the privilege not to testify against oneself contained in the Fifth Amendment to the Constitution of the United States, and the rights reserved to the states and the people of the United

States under the Ninth and Tenth Amendments of the United States Constitution.

/s/ DAVE GREENE
Dave Greene

Sworn before me this 30th day of October, 1953.

/s/ HENRY G. BAYNE

Henry G. Bayne
Notary Public, State of New York
No. 31-5224000

Qualified in New York County
Certificate filed with:
New York Co. Clerks and Registers Offices
Term Expires March 30, 1954

662

SUPREME COURT, NEW YORK COUNTY
SPECIAL TERM, PART I

In the Matter of the Application of

The People of the State of New York, by ALFRED J. BOHLINGER, Superintendent of Insurance of the State of New York, *Petitioner*,

for an Order directing him to take possession of the property and to liquidate the business, and dissolving the corporate existence, of the INTERNATIONAL WORKERS ORDER, INC., *Respondent*.

HERMAN A. SELIGSON, MARJORIE DA COSTA, JACOB HOLM-STOCK, ZACHAR SHPAK, ISIDORE SIEGEL, EARL WHEELER, and WALTER HAGELBERG for the International Workers Order Policyholders Protective Committee,
Intervenors.

Opinion

GREENBERG, J.:

This is an application by the respondent, the International Workers Order, Inc., to modify the order of this court of August 24, 1951, to the extent of authorizing and directing the Superintendent of Insurance to permit it to retain counsel for the purpose of defending the corporation in a hearing before the Subversive Activities Control Board in Washington and to make such payments as are required in this respect. A serious problem is presented by this application, particularly in the light of recent developments both in this jurisdiction and in the federal forum. A brief review, therefore, of the history of 663 the litigation is imperative.

In December, 1950, the Superintendent of Insurance of the State of New York sought to obtain an order from this court directing the respondent, International Workers Order, Inc., to show cause why it should not be dissolved on the grounds, among others, that it was a financial hazard within the meaning of the Insurance Law, and that it was dominated and controlled by the Communist Party.

Extended hearings covering eleven weeks took place before the court. On August 24, 1951, an order was entered directing the dissolution of the respondent because, while it purported to be an insurance corporation and it was chartered on that basis, it actually was a political organization created for the purpose of disseminating Communist doctrine and it therefore was guilty of obtaining its charter through fraud and, further, that this political party dominated and controlled the affairs of the respondent.

Pending ultimate dissolution, the officers of the corporation were permitted to remain in joint control with the the Superintendent of Insurance, but the officers were restrained from acting in any capacity unless they first

obtained the approval of the Superintendent of Insurance and then of the court. The Appellate Division of the Supreme Court of this Department and the Court of Appeals both unanimously affirmed the order of this court. Subsequently and in October, 1953, the Supreme Court of the United States denied certiorari and thus declined to review the issues raised by the respective parties. Application for a rehearing was also denied by that court on December 7, 1953.

664 When the Supreme Court of the United States had denied the application for certiorari, the Superintendent of Insurance procured from this court an order in October, 1953, which terminated the joint supervision of the business and property of the corporation, provided for re-insurance in accordance with the previous order of this court and of the Court of Appeals, and extended only for technical purposes the legal corporate existence of the respondent until January 19, 1954. The respondent appealed from this order, but it was affirmed this day, December 15, 1953, and the officers have all been ousted from any participation in the affairs of the respondent also as of this day.

It appears that in April, 1953, the Attorney General of the United States instituted a proceeding against the respondent corporation before the Subversive Activities Control Board. At that time the Superintendent of Insurance approved the request of the respondent to retain counsel to represent it in the preliminary stages of the proceeding. All of this transpired before the final determination in the courts of the contested issues raised both by the Superintendent and the respondent. An answer was filed by the respondent to the petition of the Attorney General. The respondent also attempted to obtain a postponement of the hearing before the Subversive Activities Control Board until after the conclusion of the liquidation proceedings in this jurisdiction. When there was adverse disposition by the Board of the respondent's motion to

dismiss the proceeding or to postpone it, the respondent requested the Superintendent of Insurance to authorize the retention of counsel to prepare for the pending hearing before the Subversive Activities Control Board, then
 665 scheduled for December 1, 1953. The Superintendent refused to authorize the respondent to retain counsel, and it thereupon made this motion for such relief.

It should be pointed out that the Superintendent himself requested the Subversive Activities Control Board to postpone the hearing until determination of the liquidation proceedings in this jurisdiction. The request was denied. The Attorney General of the United States, through his representative, on the 27th day of November also requested the Subversive Activities Control Board to adjourn its hearings until January 4, 1954. This request was likewise denied by the Subversive Activities Control Board and the hearing was set down for December 10, 1953.

When counsel representing the respective parties appeared before this court, the Superintendent's representative urged strongly that the orderly processes of the court would be interfered with if the Subversive Activities Control Board was to conduct hearings while liquidation proceedings were pending. The Superintendent's representative pointed out to this court as well as to the Subversive Activities Control Board that since the law requires that preliminary to action by the Board it be established that the respondent was Communist dominated and controlled down to the date of the hearing, that the result of the hearings would be to stigmatize the Superintendent of Insurance of the State of New York in the light of the fact that he was in virtual sole control of the organization. Such an argument appealed to the court, but apparently fell upon deaf ears with the Subversive Activities Control Board.

666 In the public interest, therefore, and on the basis of comity and in order to effectuate an orderly final dissolution of the corporate respondent, the court requested

in writing of the Board that it adjourn its hearings for a 90-day period in order to allow this court to bring to an end the liquidation proceedings. It was pointed out to the Board that by order of this court the respondent had already been declared a Communist dominated and controlled organization, that it was a financial hazard and that it should be dissolved and that the Board could add nothing to what had already been held by this court following the protracted hearings which were conducted. The Board, through its chairman, replied to the court's request, reviewed in detail the proceedings theretofore had by the Board and granted a few days' adjournment until December 16, 1953. This recital is made necessary because of the precipitate action taken by the Subversive Activities Control Board.

Two questions arise: (1) In the light of the fact that the dissolution of the respondent has been directed following the exhaustion of all relief in the courts, and in the light of the further fact that the respondent, to all intents and purposes, has been dissolved and the only phase remaining is to provide for reinsurance, is the court empowered to direct the Superintendent of Insurance to permit the retention of counsel for the respondent to defend itself against the charges alleged against it by the Subversive Activities Control Board? If the motion were granted, this court would, in effect, be allowing the respondent to defend itself against charges after its dissolution, when the court has

already found respondent guilty of such charges
 667 now sought to be relitigated by the Subversive Activities Control Board—namely, that it is a Communist dominated and controlled organization.

(2) On the other hand, if the court denied the application of the respondent for the retention of counsel, upon failure to appear before the Subversive Activities Control Board a default judgment will follow on December 16 for the non-appearance of the respondent, and that non-appearance will be due solely to the restraining order of

this court. This would seem to present an intolerable situation, and yet it is the end result of the refusal of the Board to recognize orderly procedure in this jurisdiction and accord the State of New York the recognition that it is entitled to on the basis of comity. The Board itself, after a long period of lethargy, has suddenly decided that haste is desirable. Agreed, but justice is indispensable. The courts of New York have already written an end to the respondent and have ordered its liquidation. The only remaining phase is to transfer the assets to another insurance company and provide for reinsurance. All this has been and is being done, while observing due process of law.

However, this court has no recourse but to deny the motion of the respondent for funds with which to retain counsel, on the ground that in legal contemplation the corporate respondent has ceased to exist and therefore may no longer be represented by counsel of its own choice.

Accordingly, the motion is in all respects denied.

Dated, December 15, 1953.

J. S. G.

* * * * *

671

Motion to Intervene

Dave Greene, as National Recording Secretary and Director of Organization of the International Workers Order, and Rubin Saltzman, as National Vice President and Executive Secretary of the Jewish Peoples Fraternal Order-IWO, as officers of the International Workers Order, Inc., and as members of the IWO, and on behalf of Rockwell Kent, General President; Peter Shipka, General Secretary-Treasurer and Sam Milgrom, Executive Secretary, as officers and members of the IWO, and on behalf of the members of the IWO, move for an order permitting them to intervene in this proceeding as parties, in order to defend fully against the charges of the Attorney General and to resist his demand that the IWO be required to register under the McCarran Act.

This motion is made on the grounds, among others, that the above-mentioned officers, as officers and members, together with all the members of the IWO, are directly and personally affected by these proceedings and will suffer the most serious legal and personal consequences if the Board decides in favor of the Attorney General.

/s/ DAVE GREENE
*Natl Rec Sec. and
 Member of I.W.O.*

* * * * *

675 BEFORE THE SUBVERSIVE ACTIVITIES CONTROL BOARD

Docket No. 103-53

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE
 UNITED STATES, *Petitioner,*

v.

INTERNATIONAL WORKERS ORDER, INC., *Respondent.*

Report of the Board

The petition herein was filed by the Attorney General on April 22, 1953. On May 1, 1953, Peter Shipka, then General Secretary-Treasurer of International Workers Order, Inc., filed a motion for an extension of time accompanied by an affidavit wherein he represented that as a result of a proceeding instituted by the Superintendent of Insurance for New York State the respondent had by court order been placed under the joint supervision of the Superintendent and respondent's officers. On May 29, 1953, Mr. Arthur Kinoy, an attorney, entered a general appearance for the International Workers Order, Inc., and on this date filed numerous motions directed at the petition which were disposed of by Memorandum Opinion and Order of July 21st, which fixed August 13, 1953 as the date for answer.

Pursuant to a request from Mr. Kinoy, the Board extended the answer date to August 26th. On August 21st, the Attorney General filed an Amended Petition whereupon the Board forthwith extended respondent's time for answer to September 14, 1953. On September 2nd, the respondent, through Mr. Kinoy, filed motions directed at the Amended Petition which were disposed of by the Board Order of September 18th, fixing October 19, 1953, as the date for answer.

On October 13th, the Board was in receipt of a telegraphic request from Mr. Kinoy asking for a further extension of time within which to answer and advising that he was filing suit in the United States District Court to enjoin the Board from further proceedings. On the same date, Mr. Kinoy's request was denied with the provision that respondent could amend its answer at any time within five days after entry of the decision of the District Court in the proposed injunction action.

676 On October 14, 1953, the International Workers Order, Inc., filed in the United States District Court for the District of Columbia a motion for a preliminary injunction to restrain the Board from further proceedings, accompanied by an affidavit of Dave Greene, National Recording Secretary of respondent, a complaint for a permanent injunction, and a request to convene a three-judge statutory court. One of the principal grounds relied upon before the Court was the pendency of the New York State liquidation proceeding against respondent and its effect on the proceeding before this Board.

The motion for preliminary injunction was denied by order entered October 27, 1953, and the request for a three-judge statutory court was denied therein on the ground that no substantial constitutional issue was involved. Upon motion by the International Workers Order, Inc., the complaint for a permanent injunction was dismissed on November 2, 1953.

On October 19, 1953, Mr. Kinoy filed respondent's answer and on November 2nd, an Amended Answer.

On November 3rd, the hearing to take evidence was scheduled by notice of the Board for commencement on December 1st. On November 6th a motion was filed by Mr. Kinoy, asking for postponement of the hearing date to January 19, 1954, which was opposed by petitioner, and denied by Board Order of November 13th.

On November 19th, the Board was informed by a letter from Mr. Kinoy that pursuant to approval of the Superintendent of Insurance he had been retained to represent respondent only through the initial motion stages of this proceeding, and that the Superintendent had not authorized the retention of counsel to appear for hearing. By letter of December 7, 1953, Mr. Kinoy indicated he had considered his letter of November 18, 1953, as a withdrawal of his appearance as counsel for the respondent before this Board.

On November 27th a motion was filed by petitioner to postpone the hearing to January 4, 1954, accompanied by a letter dated November 25th addressed to Honorable Herbert Brownell, Jr., from Mr. Alfred J. Bohlinger, Superintendent of Insurance of the State of New York. On

November 30th, this motion of petitioner was denied
677 by Order of the Board and the hearing was ordered to proceed on December 1st as previously scheduled.

In its order denying this motion the Board stated:

"Since petitioner has been aware continuously of the existence and nature of the New York State liquidation proceedings and their relation with the proceedings before the Board and has within the past three weeks represented that those proceedings will not determine the proceedings herein and states no grounds in the instant motion other than the letter of the Superintendent of Insurance, the Board must conclude that there is no conflict of interest between the two proceedings. Further, it is not apparent to the Board that there is any substantial change in the rela-

tive status of the two proceedings. For these reasons, the Board is impelled to conclude that the motion should be denied."

At the hearing on December 1st, petitioner appeared and indicated that he was ready to proceed. No one appeared for the respondent although Mr. Dave Greene, General Recording Secretary of the International Workers Order, Inc., appeared with the permission of the Superintendent of Insurance and read into the record a statement to the effect that the officers of the International Workers Order, Inc., were restrained by court order from appearing on its behalf and that in view of the refusal of the Superintendent of Insurance to authorize counsel, the officers had applied to the Supreme Court of New York for authorization to retain counsel to represent the International Workers Order, Inc., at the hearing before this Board. The hearing was continued to December 10th by the presiding Board member in order to permit the New York Court to rule on the counsel question, whereupon petitioner, noting that he had no objection to the continuance granted, moved, for the record, for a default order under Section 13(d)(2) of the Act, which was denied.

Upon reconvening the hearing on December 10th, counsel for petitioner appeared and again stated that he was ready to proceed. No one appeared for the respondent, although Mr. James B. Henry, Jr., Special Assistant Attorney General of the State of New York and Special Counsel to the Superintendent of Insurance of that State, and Mr. Arthur Kinoy appeared as officers of the Supreme Court of New York State to present a letter from the Honorable Justice Henry Clay Greenberg wherein it was requested that the Board postpone this proceeding for a period of 90 days. Counsel for petitioner opposed any continuance on the basis of Judge Greenberg's letter and again moved for an order finding the respondent to
 678 be in default. The request for postponement and

the motion for default were referred to the Board by the presiding member and the hearing was recessed. On December 11, 1953, the Board, after due consideration of Judge Greenberg's request, ordered that the hearing for the presentation of evidence be reconvened on December 16, 1953.

At the reconvened hearing on December 16, 1953, counsel for petitioner appeared and stated that petitioner was ready to proceed. No one appeared to represent the respondent although Mr. Henry appeared specially "on behalf of the Superintendent of Insurance in order to inform the Board of certain changes in the factual situations which have occurred since the Board last convened." Mr. Henry read into the record the decision of Mr. Justice Greenberg denying the application made by the officers of the respondent for authorization to retain and pay counsel to represent the respondent in this proceeding. In this decision the court also stated that the joint supervision of respondent's officers and the Superintendent of Insurance had been terminated leaving the Superintendent in sole supervision of the respondent and that "the officers have all been ousted from any participation in the affairs of the Respondent . . .". As its basis for refusing to authorize counsel, the court stated: "However, this court has no recourse but to deny the motion of the Respondent for funds with which to retain counsel, on the ground that in legal contemplation the corporate Respondent has ceased to exist and therefore may no longer be represented by counsel of its own choice."

Also present on December 16th were Mr. Dave Greene and Mr. Rubin Saltzman, who prior to their ouster were General Recording Secretary and General Vice-President of respondent, respectively. They stated that they had no authority to represent, and did not in fact represent, the respondent, but insisted that they were still officers and members of the respondent notwithstanding their discharge by the Superintendent and as such moved to inter-

vene on their own behalf as well as on behalf of Rockwell Kent, former General President, Peter Shipka, former General Secretary-Treasurer, and Sam Milgrom, 679 former Executive Secretary, as officers and members of the respondent, and also on behalf of the members of the respondent. Mr. Greene also moved to dismiss the petition and in the alternative for an extension of time to prepare for the hearing. Petitioner moved for an order by default under Section 13(d)(2) of the Act and objected to and moved to strike the motions and statements made on the record by Messrs. Greene and Saltzman.

The various matters presented were referred to the Board which, after notice, heard oral arguments thereon on January 4, 1954. At that time counsel for petitioner appeared, Mr. Paul W. Williams and Mr. Henry, Special Assistant Attorneys General of the State of New York, appeared specially on behalf of the respondent qua the Superintendent of Insurance of New York State, and Mr. John J. Abt appeared as counsel for Dave Greene, Rubin Saltzman, Rockwell Kent, Peter Shipka, and Sam Milgrom, applicants for intervention individually, and as officers and members of the respondent, and on behalf of the other members of the respondent.

Mr. Williams stressed that the position of the Superintendent of Insurance, being in sole supervision of the respondent, was that "he and he alone is authorized to appear on behalf of the International Workers Order as a corporation and he and he alone is authorized and can appear on behalf of the members of the IWO." On this basis Mr. Williams opposed Mr. Abt's appearance and the intervention of the aforementioned individuals as officers and on behalf of the some one hundred thousand members of the respondent.

The position of the Superintendent of Insurance with respect to this proceeding was stated by Mr. Williams as follows:

"First of all, while I appear for the Superintendent of Insurance, I want to make it clear that, one, the

Superintendent of Insurance is not defending the IWO. Indeed, the Superintendent of Insurance was the first one to denominate the IWO a communist organization and through his application to the Supreme Court of the State of New York, the charter as an insurance company and fraternal benefit society of the IWO was taken away and the IWO was denominated an alter ego of the Communist Party.

680 "Therefore, the Superintendent is not going to be put in the ridiculous position of defending the IWO because we do not do that. It was a subversive organization.

"The only question is whether the IWO, which is now a corporate husk and is dead, should be compelled to register, or whether the Superintendent of Insurance should be compelled to defend it when its views coincide with that of the Attorney General, and I am authorized to say that, first of all, the Superintendent of Insurance will not defend; second, that the Superintendent of Insurance will not authorize any one to defend on his behalf, and would not authorize the expenditure of any money to defend." (Tr. 231-32)

Petitioner also opposed the intervention and again moved the Board to grant its motion for a default order made by it on December 10, 1953, and renewed on December 16th. Counsel for petitioner represented, and Mr. Williams agreed,¹ (Tr. 268) that under the applicable law and rulings of the Courts of New York the respondent is presently in legal existence as a corporate entity.

In opposing the motion to intervene petitioner noted that there is no provision in the Act or in the Board's rules concerning intervention, but that under the provisions of the Administrative Procedure Act intervention by interested parties is permissible under certain circumstances. Petitioner took the position, however, that "The status of this proceeding is such as to make it manifest that third parties could not under any circumstances intervene at this time."

¹ On behalf of the Superintendent of Insurance, it was stated that the time of dissolution will be extended until "such time as the hearings on reinsurance, which are now before a referee, are terminated and the contract becomes final." (Tr. 279)

Petitioner in support of this position contended that intervention is not proper where, as here, no respondent has appeared to defend the action and that the intervention sought amounts to a substitution of parties, which petitioner opposes; that petitioner was not served with a copy of the motion to intervene; and that the purpose of the intervenors is not to defend the action but to effect a dismissal or a continuance of the proceeding.

Mr. Abt stated the purport of the motion to intervene as follows: (Tr. 308)

“The intervenors are not here appearing on behalf of the IWO. They don't pretend to represent the IWO. They say, ‘We are officers of this organization. Our rights’ ... I will put it the other way, ‘By virtue
681 of the fact that we are officers, we are going to be very vitally affected by any judgment entered in this proceeding by virtue of the fact that we are members ...’”

He argued that under the applicable Federal law, as codified by Rule 24(a) of the Federal Rules of Civil Procedure applicants must be permitted to intervene as of right if they can show (1) that the representation of their interests is or may be inadequate and, (2) that they are or may be bound by the judgment in the action. Mr. Abt contended that the interests of the intervenors and the other members of the IWO are not being represented in this proceeding and that a final order requiring the registration of respondent may subject applicants, as officers or former officers, to the criminal provisions of Section 15 of the Act and would render them, as members, along with the other members of the respondent, ineligible for Federal employment and for passports to travel outside the United States and would make alien members subject to deportation and ineligible for naturalization, or if naturalized since January 1, 1951, subject to automatic denaturalization. He took the further position that applicants are seeking intervention on behalf of the members of the re-

spondent as a class and that they come within the purview of Rule 23 of the Federal Rules of Civil Procedure respecting class actions.

Counsel for applicants also opposed granting petitioner's motion for a default order asserting that, as a result of the supervision of respondent by the New York authorities, the Board cannot find that respondent is dominated and controlled by the Communist Party and further that the failure of anyone to appear on behalf of the respondent was not due to any voluntary act of respondent, but due to the action of the Supreme Court of the State of New York.

We shall first treat with the motion to intervene. It appears from the record in this proceeding that the applicants were dismissed as officers of respondent by the Superintendent of Insurance when the latter became vested with sole supervision of respondent and they are therefore no longer officers of the respondent and have not been such since December 15, 1953. Accordingly, in considering this motion we can view applicants only as former officers and as possible members. It is not clear in the record
682 whether applicants, all of whom were former officers, were members by virtue of being officers, or whether they, in addition to being officers, owned individual membership in respondent which continued beyond their discharge as officers.

However, we will assume *arguendo* that applicants are presently members of the respondent. We cannot, however, ignore the facts that placed them in a position with interests peculiar and distinct from those of the rank and file members whom they claim to represent as a class. As reported in 106 N.Y.S. 2d 953, *Application of Bohlinger, In re International Workers Order, Inc.*, the Supreme Court of New York State in its opinion, of which we now take official notice for purposes of this motion, stated:

"... The petition upon which the application was based recited (1) that the International Workers Order (hereinafter referred to as I.W.O.) had been found, after an examination to be in such condition that

its further transaction of business would be hazardous to its policy holders, to its creditors, and to the public . . ."

* * *

"More specifically, the petition alleged that the I.W.O. was and is dominated by the Communist Party . . . These conclusions and others of the petition were predicated upon . . . the report and recommendations of the examiner who found that the I.W.O. was not simply a fraternal benefit society as it was required to be by its charter and its stated purposes but in fact an agency of the Communist Party of the United States which disseminated its doctrines through the instrumentality of the various subordinate lodges of the I.W.O. and through the agency of the governing body, its officers, and executive committee; that the activities of the I.W.O. constituted a hazard as defined in the Insurance Law and also that they were in direct conflict with its charter, its stated purposes, and the laws of the State; . . ." (p. 956-957)

and further:

* * *

"The evidence also establishes that the tie of the I.W.O. to the Communist Party and its activities on behalf of the party and in line with the party doctrines, were not a result of coincidence but rather carefully planned and organized by the leaders of the I.W.O." (p. 968)

Concerning the former officers of the respondent, the court found:

683 "The picture as of today has not changed. Of the ten present national officers, nine have been identified as members of the Communist Party. Of these nine, eight have refused to answer questions as to their membership in the Communist Party on the ground that their answers might tend to incriminate them but the evidence points convincingly to the fact of their membership in the Communist Party. The other, Rockwell Kent, the present president of the order, denied that he is or ever has been a member of the Communist Party. Quite apart from the matter

of membership, his writings reveal a very active sympathy with and support of Communist ideas and the U.S.S.R. Among the present ten national officers, six have been identified as *active* Communist Party members. Of these six, five were further identified as having participated in key Communist Party committees. These include Rubin Saltzman, Vice-President, Louise Thompson Patterson, vice-president, who not only claimed privilege but who even went so far as to refuse to identify a picture of herself in order to make difficult her identification as a Communist; Peter Shipka, general secretary and treasurer of the order; David Greene, former national youth organizer of the I.W.O. and now recording secretary, whose speech at the Communist convention has been referred to above; Samson Milgrom, executive secretary, a position which perhaps carries the greatest influence in the order; John E. Middleton, vice-president and Executive Director of the general lodges; Bronislaw Wojkowski, vice-president of the Polonic Society; and Nahum Polsk, assistant treasurer." (p. 971)

With respect to members the court stated:

"... Furthermore, there is no doubt from the evidence that many members of the I.W.O. lodges came in solely because of the insurance benefits or social and fraternal participation and were not Communists or even clearly aware of the ties between the I.W.O. and the Communist Party. . . . Even if many of the members may have been unaware of any of the objectives beyond those immediate objectives for which they joined, the organization took its character and meaning not from those innocent members but from the leaders and the program they carried out, making use of the innocent as well as the more politically astute members." (p. 974)

One of the primary purposes of the New York State proceeding was to protect the policyholders of respondent and, based upon the fact of its domination by the Communist Party through its officers and other circumstances, the court stated:

"These then are the facts which demonstrate inescapably that the I.W.O. 'is in such a condition that its further transaction of business will be hazardous to its policyholders, its creditors and to the public'." (p. 981)

Further, the court stated:

"It follows therefore that the Superintendent of Insurance is entitled to an order of dissolution and liquidation of the I.W.O. Every legitimate interest of the policyholders will be safeguarded and maximum protection will be afforded to all interested parties by court supervision and direction." (p. 987)

684 It appears from the foregoing² that the applicants, all former officers, have interests foreign to and, indeed, conflicting with, those of the rank and file members of respondent whom they here seek to represent. Moreover, it should be noted that applicants have made no showing whatever that the members they purport to represent have notice of this proposed intervention or of its purported representative character or that they desire or acquiesce in such representation, or that there is a "class" interest susceptible of such representation. Furthermore, the Superintendent of Insurance opposes the intervention on behalf of the members and represents to this Board that applicants have no authority to represent the other members of the respondent and may in fact be violating the court order when they attempt to do so. We conclude that, under the circumstances, applicants do not and cannot represent the other members of the respondent in this proceeding.

This brings on for consideration whether or not applicants may intervene as of right as five individual members of the respondent. As applicants' counsel asserted, this requires a showing that their interest is or may not be adequately represented and that they are or may be ad-

² These facts as found by the New York Court have come to the attention of this Board in the official course of its duties regarding the subject proceeding.

versely affected by an order of registration against the respondent. We cannot agree with applicants' counsel that, as former officers, applicants would, under the particular circumstances involved, be subject to criminal liability if the respondent is ordered to register and fails to do so. Consequently, we shall proceed to examine the effect such an order may have with respect to them as members of respondent.

The "rights" which allegedly would be affected are those of Federal employment, passport privileges, of alien members to naturalization and retention of citizenship where naturalized after January 1, 1951, and of alien members not to be deported. There has been no showing made by applicants as to what their personal situations are with respect to any of these matters. There is no showing that any are naturalized citizens, or aliens, or seeking naturalization, or have been naturalized since

January 1, 1951, or that any are Federal employees;
685 and under existing Federal law and regulations,

Federal employment and passport privileges are not available to them, since it is a matter of public record, as found in the New York decision, *supra*, that all applicants except Mr. Kent are active members of the Communist Party and functionaries of its committees.

Further, in the light of this decision, if any of the applicants are aliens or naturalized citizens or seeking naturalization, they are already in jeopardy of being subjected to actions against them of the nature of those that would be made possible by an order of registration against the respondent. Also, this Board, after a lengthy hearing, has found the Communist Party to be a Communist-action organization and ordered it to register. The applicants, as members of the Communist Party, are already in jeopardy of those sanctions under that order.

As to Mr. Kent, it is apparent from the aforementioned New York State proceeding, that he is immersed in Communist activities to an extent that he is also presently in

jeopardy regarding these so-called "rights". In fact, it is a matter of record in the Department of State that he has twice been denied a passport by that Department in recent years.

Under all the circumstances here presented we find that applicants are not entitled as of right, and should not in the discretion of the Board, be permitted to intervene in this proceeding.

In view of the denial of the motion to intervene we do not reach the motions made by Messrs. Greene and Saltzman to dismiss the petition or for an extension of time, and they are, accordingly, dismissed.

There is left for ruling the motion made by petitioner for a default order. This proceeding has been convened three times for the taking of evidence and each time no one appeared on behalf of respondent for this purpose. Section 13(d)(2) of the Subversive Activities Control Act of 1950 provides that where an organization fails to appear at a hearing accorded to such organization, the Board may without further proceedings and without the introduction of evidence, enter an order requiring such organization to register.

686 Concerning Mr. Abt's contention that under the facts of this case the Board cannot find that the allegations of the petition are true, it does not appear of record that this is the case. This is borne out by Mr. Williams' representations that neither the Superintendent of Insurance nor his representatives have attempted to police or supervise the meetings of some seventeen hundred lodges of respondent throughout the country; and that there was no method by which any subversive activity could have been detected or punished, or brought to the Court's attention. On this state of the record we are not required to speculate as to whether the allegations of the petition are provable. The Attorney General has stood ready to submit evidence in support of these allegations.

Since the only legally competent representative of respondent before this Board, acting under the decisions of the Courts of New York State, declines to defend respondent in this proceeding, the Board is left with no alternative but to grant petitioner's motion for a default order under Section 13(d)(2) of the Act.

Accordingly, applicants' motion for intervention is denied and petitioner's motion for a default order is granted. An appropriate order will be entered.

BY THE BOARD:

/s/ THOMAS J. HERBERT
Thomas J. Herbert, *Chairman*

/s/ KATHRYN McHALE
Dr. Kathryn McHale, *Member*

/s/ DAVID J. CODDAIRE
David J. Coddair, *Member*

/s/ WATSON B. MILLER
Watson B. Miller, *Member*

/s/ HARRY P. CAIN
Harry P. Cain, *Member*

Washington, D. C.
January 14, 1954

* * * * *

687

Order of the Board

The Board having this day issued its report herein in which it finds and determines that the International Workers Order, Inc., respondent herein, has, within the meaning of Section 13(d)(2) of the Subversive Activities Control Act of 1950, hereinafter called the Act, twice failed to appear at a hearing accorded it under and pursuant to the provisions of said Section 13 of the Act; and that accordingly petitioner's motion for an order pursuant to Section 13(d)(2) of the Act requiring respondent to register as a Communist-front organization should be granted

IT IS ORDERED that the said respondent, the International Workers Order, Inc., shall register as a Communist-front organization under and pursuant to Section 7 of the Act.

BY THE BOARD:

/s/ THOMAS J. HERBERT
Thomas J. Herbert, *Chairman*

/s/ KATHRYN McHALE
Dr. Kathryn McHale, *Member*

/s/ DAVID J. CODDAIRE
David J. Coddair, *Member*

/s/ WATSON B. MILLER
Watson B. Miller, *Member*

/s/ HARRY P. CAIN
Harry P. Cain, *Member*

Washington, D. C.
January 14, 1954

* * * * *

690

Motion for Leave to Intervene

PAULINE OSSIP and ZEBEDEE COLLINS by their attorney, move the Board as follows:

1. To grant them leave to intervene in and to defend this proceeding on their own behalf and on behalf of all other members of the International Workers Order, Inc.

2. To vacate the order of the Board dated January 14, 1954, ordering the International Workers Order, Inc. to register as a Communist-front organization.

3. To set this proceeding down for a hearing, to examine witnesses and receive evidence pursuant to Section 13 (c) of the Act upon the petition of the Attorney General, the answer of the International Workers Order, Inc., the annexed affidavits of movants, and such further responsive pleading by movants, if any, as the Board may require or permit them to file herein.

Movants submit the annexed affidavits in support of this motion, and request oral argument upon this motion.

Dated: New York, N.Y. January 29, 1954.

/s/ JOHN J. ABT
John J. Abt,
their attorney

691 **Affidavit in Support of Motion for Leave
to Intervene**

State of New York }
New York County } ss

Pauline Ossip, being duly sworn deposes and says as follows:

1. I am a resident of New York City and a citizen of the United States, and I am making this affidavit in support of the annexed motion for leave to intervene in this proceeding.

2. Since 1948 I have been and now am a member of the International Workers Order, Inc., herein called the "Order", and a holder of a \$1000 life insurance policy issued by the Order.

3. The Order is a fraternal benefit society, organized under New York Law. I am informed and believe that it has approximately 100,000 members and policyholders residing in many states.

4. The Order is not a Communist Front organization as alleged in the petition. It is not directed, dominated or controlled by the Communist Party. It is not operated for the purpose of giving aid or support to the Communist Party. On the contrary, from December 15, 1950 to the present time it has been and is now being operated under the complete supervision of the Supreme Court of New York. From December 15, 1950 to December 15, 1953 it was operated under the joint management of the Superin-

tendent of Insurance of New York and the officers of the Order. Since December 15, 1953, and pursuant to an order of the Supreme Court of New York, it has been and now is operated under the sole management of the Superintendent of Insurance. The Order, therefore, is now under
 692 the exclusive direction, domination and control of the Superintendent of Insurance. It is being operated solely for the purpose of effectuating the policy of the insurance laws of New York, as construed and applied by the courts of New York. If permitted to intervene, I and the other applicants for leave to intervene are prepared to present evidence to prove the foregoing facts and to defend the proceedings on the grounds stated in this paragraph.

5. The Superintendent of Insurance has failed and refused to defend the Order in the hearing of this proceeding or to authorize anyone else to defend it, and the Supreme Court of New York has refused to authorize any person to represent or defend the Order in such hearing. The Superintendent of Insurance, further, failed and refused to oppose the application of the Attorney General for a default order in this proceeding.

6. I am not now and never have been a member of the Communist Party. I am eligible to apply for and hold non-elective office in the federal government. I am also eligible to apply for and receive a U.S. passport.

7. On information and belief: Many members of the Order are non-citizens, some of whom have applications for naturalization pending and others of whom intend to apply for naturalization. Some citizen members of the Order have been naturalized as citizens since January 1, 1951; some are employees of the federal government. Many members of the Order are eligible to apply for and hold non-elective office in the federal government and are also eligible to apply for and receive U.S. passports.

8. Unless the motion for leave to intervene is granted and the registration order of the Board dated January 14, 1954 is set aside:

A. I, and the other members of the Order, otherwise eligible for federal employment and passports, will be denied the right and privilege to apply for or secure such employment or passports.

693 B. Members of the Order now holding federal employment will be discharged.

C. Non-citizens members of the Order will be denied naturalization, will be subject to deportation and will be deported.

D. Citizen members who have been naturalized since January 1, 1951 will be subject to denaturalization and will be denaturalized.

9. The members of the IWO are so numerous that it is impractical for them to join in this proceeding. On information and belief: Many members are unaware of the pendency of this proceeding or of its effect on their rights. Many others who know of the pendency of this proceeding are unaware of the failure and refusal of the Superintendent of Insurance to defend the Order and the rights of its members in this proceeding or of the entry of a default order.

10. I did not learn of the failure and refusal of the Superintendent of Insurance to enter a defense in this proceeding or of the action of the Board in refusing to permit the officers of the Order to defend the proceeding and in entering a default order until January 27, 1954.

11. The applicants for intervention can and will adequately represent the other members of the Order in this proceeding in defense of the common rights of all members, and in defense of their several rights, all of which depend on the common questions of law and fact presented by the petition.

PAULINE OSSIP

Subscribed and sworn to before me this 27 day of January, 1954.

CARL BRODSKY
Notary Public

CARL BRODSKY, *Notary Public*
State of New York, No. 61-5425930
Qualified in New York County
Cert. Filed with N. Y. Co. Reg.
Commission Expires March 30, 1955

* * * * *

694 **Affidavit in Support of Motion for Leave
to Intervene**

State of New York }
New York County } ss

Zebedee Collins, being first duly sworn, deposes and says as follows:

1. I am a resident of New York City and a citizen of the United States, and I am making this affidavit in support of the motion of myself and other members of the International Workers Order, Inc., herein called the "Order", for leave to intervene in this proceeding on our own behalf and on behalf of all other members of the Order.

2. Since 1948 I have been and now am a member of the Order, and a holder of a \$500 life insurance policy issued by the Order.

3. I am not now and never have been a member of the Communist Party. I am eligible to apply for and hold non-elective office in the federal government. I am also eligible to apply for and receive a U. S. passport.

4. I did not learn of the failure and refusal of the Superintendent of Insurance of New York to enter a defense in this proceeding until January 18, 1954 at which time I also learned of the action of the Board in refusing to permit the officers of the Order to defend the proceeding and in entering a default order.

5. I have read the affidavit of Pauline Ossip, dated January 28, 1954 which is annexed to the motion to intervene in this proceeding, and I am informed and believe that the statements contained therein are true.

/s/ ZEBEDEE COLLINS

Subscribed and sworn to before me
this 27th day of January, 1954

/s/ CARL BRODSKY
(Notary Public)

(Notary's stamp)

* * * * *

697 **Petitioner's Memorandum in Opposition to Motion Filed by Pauline Ossip and Zebedee Collins to Vacate the Order of the Board Dated January 14, 1954, Ordering the International Workers Order, Inc. to Register as a Communist-Front Organization**

I

1. No showing has been made which would alter the status of this proceeding to justify vacating the order of the Board dated January 14, 1954, ordering the Respondent to register as a Communist-front organization pursuant to Section 7 of the Internal Security Act of 1950.

2. The request of Pauline Ossip and Zebedee Collins, purporting to be members of the Respondent, for leave to intervene in the proceeding on behalf of themselves
698 and other members of the Respondent, is nothing more than an attempt on the part of these individuals to substitute themselves and others for the Respondent in this proceeding. Such a procedure is without legal precedent. Legal authority supporting Petitioner's position on this question is stated in the transcript of the proceeding before the Board on January 4, 1954, at page 251 and continuing to page 253.

CONCLUSION

The motion of Pauline Ossip and Zebedee Collins is without merit and should be denied.

Respectfully submitted,

/s/ NOEL E. STORY

Noel E. Story

Attorney for Petitioner

February 11, 1954

* * * * *

707 **Memorandum Opinion and Order of the Board**

On February 1, 1954, Pauline Ossip and Zebedee Collins, by their attorney, John J. Abt., Esq., moved the Board to grant them leave to intervene in and to defend this proceeding on their own behalf and on behalf of all other members of the International Workers Order, Inc., and asked that the Board's Order of January 14, 1954, ordering the IWO to register as a Communist-front organization, be vacated and the proceeding set down for hearing pursuant to Section 13(c) of the Act. Oral argument is requested.

This motion was accompanied by affidavits of Ossip and Collins, which allege that both are United States citizens resident in New York, both are members and policy holders of the IWO, are not now and never have been members of the Communist Party, and are eligible for federal employment and passport privileges; that neither learned of the failure and refusal of the Superintendent of Insurance of New York State to defend the IWO in this proceeding, or of the Board's order directing the IWO to register as a Communist-front organization, until January 18, 1954, or later. Both further assert that the IWO is not a Communist-front organization and is not dominated and controlled by, or operated to aid and support the Communist Party, but that to the contrary, since December 1950, it has been under the joint or exclusive management of the Superintendent of Insurance and operated to effectuate the policy

of the insurance laws of New York. If permitted to intervene, applicants state they are prepared to present evidence of these facts and to defend the proceedings on the aforementioned grounds.

Applicants further assert, on information and belief, that many IWO members are non-citizens, naturalized citizens, employees of the Federal Government, or otherwise eligible for federal employment and passport privileges, and
 708 that unless the motion for intervention is granted and the Board's Order of January 14th set aside, applicants and other members of the IWO will be denied passport privileges and federal employment, and other members will be denied the privileges of becoming naturalized citizens, or be subject to denaturalization. It is further stated that applicants can and will adequately represent the other members of the IWO who are so numerous as to make it impractical to join them; and, on information and belief, it is asserted that many are unaware of the pendency of this proceeding, or its effect on their rights.

On February 12, 1954, petitioner filed a memorandum in opposition to this motion contending that applicants for intervention have made no showing which would alter the status of this proceeding to justify vacating the order of the Board, and that the intervention sought is but an attempt by applicants to substitute themselves and others for the respondent in this proceeding which finds no support in legal authority. Petitioner also refers to his previous opposition¹ to the intervention in this proceeding on January 4, 1954, by certain of respondents former officers.

On February 19, 1954, applicants moved to expedite disposition of the motion to intervene by asking that the Board grant the relief prayed for without oral argument, or, in the alternative, to give oral argument and dispose of the motion by order on or before March 4, 1954. This motion was accompanied by an affidavit of Mr. Abt, applicant's attorney, wherein he represents that if the motion to intervene is denied, applicants will petition the United

¹ See Tr. 251-253, inc.

States Court of Appeals for the District of Columbia Circuit to review and set aside the Board's Order of January 14, 1954, which petition, he asserts, must be filed on or before March 15, 1954.

Inasmuch as the Board always favors reasonable expedition of proceedings, and in view of the fact that oral argument is neither warranted nor necessary for a proper consideration of the motion to intervene, the request for oral argument thereon is denied. Since the Board herein disposes of the motion to intervene within the time requested, the motion to expedite needs no further consideration.

Before treating with the motion to intervene, it is desirable to set out briefly certain background facts. On January 14, 1954, the Board issued a Report and Order in this proceeding wherein it found that five former officers of the respondent corporation had no intervenable interest as officers, individual members, or as representatives of other members of the IWO as a class, and that the Superintendent of Insurance was the only competent representative of the respondent then before the Board.² In view of the Superintendent's declination to defend the IWO, the Board, pursuant to Section 13(d)(2), found the respondent failed to appear at a hearing accorded it pursuant to Section 13 of the Act, and ordered it to register as a Communist-front organization, pursuant to Section 7 of the Act.

We would like to note at the outset that it is in the public interest in proceedings of this nature, as manifested by the Congressional findings in Section 2 of the Act, that such proceedings should not be unduly protracted, particularly by recurrent attempts to intervene. Mr. Abt heretofore represented five former officers of the respondent who sought to intervene in this proceeding, which was denied for the reasons set forth in the Board's Report of January 14. He now represents applicants who were not former officers of the respondent and who affirmatively

² The instant motion was not served upon the Superintendent of Insurance.

allege that they are not now and never have been members of the Communist Party. They evidently are seeking to develop the proposition that these additional facts tend to establish an interest which will justify intervention. We do not agree.

These new applicants for intervention indicate by their affidavits that they had prior knowledge of the New York State proceeding³ against the respondent which has now reached its final stages. Because the question of respondent's representation before this Board was fully
710 litigated in the New York courts in the aforementioned proceeding, it is difficult to understand why applicants did not move to intervene at an earlier date. Moreover, it is apparent that if permitted to intervene they intend to defend this proceeding on the basis of facts which were already before the Board, viz., that the Superintendent of Insurance has supervised the respondent jointly or exclusively since 1950.

As stated in our Report and Order of January 14, the New York State proceeding is not dispositive of the issues in the proceeding before this Board, particularly since it has been represented to the Board by counsel for the Superintendent of Insurance that the New York authorities have not attempted to police or supervise the meetings of some 1700 lodges of respondent throughout the country, and that there was no method by which any subversive activity could have been detected or punished or brought to their attention. In the face of this representation, applicants, who are rank and file member policy holders resident in New York, with no showing that they possess information or knowledge as to the activities of the IWO membership country-wide, would have us set aside our Order previously entered and commence a hearing.

Applicants make no showing that they would sufficiently represent the other IWO members as a class or that there

³ Also, the representative of the Superintendent of Insurance confirmed the fact that all members of the respondent were contacted by letter regarding the proceeding at its inception (Tr. 326-327).

is a class susceptible of such representation. Also, as indicated in our Report, *supra*, the protection of the interests of the rank and file members of the IWO was one of the primary objectives of the New York State proceedings and these members are now only competently represented by the Superintendent of Insurance. Consequently, they may not intervene herein on behalf of other members of the IWO.

Concerning intervention on their own behalf, applicants contend they are presently entitled to federal employment and passport privileges and, therefore, have sufficient interest to warrant the Board vacating its prior Order and setting this proceeding for hearing. Applicants make no showing, however, that they have or ever intend to apply for such privileges. In any event, as is readily apparent, applicants' eligibility for federal employment and 711 passports is highly questionable since they are members of an organization which the New York courts (cert. den. 346 U.S. 857, reh. den. 346 U.S. 913) have found to be Communist controlled. Such contingent interests standing alone do not, in our opinion, warrant granting the relief requested. Accordingly, the motion to intervene and the relief requested therein are denied.

It is therefore

ORDERED that applicants' motion for leave to intervene, filed February 1, 1954, should be, and it hereby is, denied.

By direction of the Board.

(Signed) THOMAS J. HERBERT
Thomas J. Herbert
Chairman

March 4, 1954
Washington, D. C.

EXCERPTS FROM PROCEEDINGS BEFORE THE BOARD

145 Mr. Henry: * * *

* * * * *

146 Another question is, could it be declared sub-
versive after it was dissolved, assuming that the
147 hearing began and a dissolution order became final
and then the hearing continued. Would that be
possible? Since all officers and employees of the organiza-
tion were forbidden by the Court and by the Superintendent
of Insurance to engage in activity while the corporate
entity was under the control of the Court, could their
subversive activities, if there were such and there may
well have been, be imputed to the corporation? Is this a
question which is governed by the law of the State of New
York.

* * * * *

150 In the event that the order did become final after
dissolution, or if it became final at a time when the
Superintendent of Insurance was in sole control of the
business, would the Superintendent of Insurance of the
State of New York be required to register the IWO
151 as subversive? Or, if not, who would be so required,
because the Superintendent would be the only one in
charge of the organization?

I might say in that connection that immediately after
the entry by the Supreme Court of the order denying
petition for certiorari of the International Workers Order,
at the motion of the Superintendent of Insurance, Judge
Greenberg entered an order granting the Superintendent
of Insurance sole supervision of the business of the Inter-
national Workers Order, and as soon as that order was
granted to the Superintendent of Insurance, he notified all
the officers of the IWO and all the organizers, who are in
effect the officers of the nationality societies, that their
services were terminated.

The IWO went into the Appellate Division and got a
stay of that order. It has been argued on appeal and is

now pending before the Appellate Division. It might possibly be decided today. So that today perhaps the Superintendent of Insurance will be the only one in control of the International Workers Order.

Mr. Coddair: What was the date of the order of sole supervision?

Mr. Henry: That was October 22.

Mr. Coddair: What year?

Mr. Henry: 1953. It has been stayed ever since its entry. And in connection with that problem, I might
152 mention that Section 794 of the Subversive Activities

Control Act provides penalties with respect to any organization or individual required to register by a final order who does not register. The individuals required to register are described in Section 796 (h) of that Act, which provides, and I quote, "In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization and of such officer or officers as such organization as the Attorney General shall by regulation prescribe, to register for the organization."

Now, when the Superintendent of Insurance is in sole control, the only person performing the duties of an executive officer or of a secretary will be the Superintendent of Insurance.

* * * * *

167 Mr. Henry: Mr. Chairman, my name is James B. Henry. I am a special assistant attorney general of the State of New York and special counsel to the Superintendent of Insurance of the State of New York. I am appearing here especially on behalf of the Superintendent of Insurance in order to inform the Board of

certain changes in the factual situations which have occurred since the Board last convened.

In the first place, the Appellate Division of the Supreme Court of the State of New York yesterday unanimously affirmed the order entered by Mr. Justice Henry Clay Greenberg on October 22 of this year which gave to the Superintendent of Insurance of the State of New York sole supervision and control of the International Workers Order.

Accordingly, yesterday pursuant to that affirmance and pursuant to the order giving the superintendent sole supervision, the Superintendent of Insurance discharged all officers and organizers of the International Workers Order and dissolved all lodges and subsidiary organizations. In that connection I would like to say that I notice that Mr. Dave Greene, former recording secretary of the International Workers Order, and Mr. Rubin Saltzman, former vice president of the International Workers Order, are present here. I would like to make it clear that they have no authority whatever to appear on behalf of the International Workers Order.

* * * * *

170 Mr. Henry: May I state again for the record that these gentlemen are not officers of the International Workers Order and that pursuant to court order they have no authority to appear for the International Workers Order.

* * * * *

174 Mr. Henry: They were notified yesterday they were no longer officers of the International Workers Order. They have been discharged. They have been paid in full, and their services are terminated.

Mr. Coddair: Mr. Greene is shaking his head no, meaning, I suppose, that he has not been notified.

Have you been notified, Mr. Greene, that you are no longer an officer of the corporation?

Mr. Greene: No, I have not.

Mr. Henry: In that event, I will so notify you at this time on the record.

* * * * *

193 Mr. Coddair: As I understand it, Mr. Story wanted to know whether or not you were going to continue your activities as officers of the corporation even though the corporation has been dissolved by court order.

Mr. Greene: We do not intend to violate the injunction. However, there are two fields in which we feel we can operate as officers of the IWO: First, to defend ourselves before this Board; and secondly, in the whole proceedings around the reinsurance plan based on an agreement by Judge Greenberg, we as officers have that right to appear and argue on the whole question of reinsurance. Otherwise, we are not in the management of the affairs of the International Workers Order, and we want that made clear.

* * * * *

205 Mr. Henry: I simply wanted to state again for the record that Mr. Greene and Mr. Saltzman are not officers of the organization. They cannot represent it. They have no authority to represent the members, either.

Mr. Coddair: Of course, it now becomes a question of fact because they say they are officers of the corporation.

They have received no notice they have been discharged. Until such time as they do receive some notice, I suppose they may feel that way technically.

Mr. Henry: I make that statement as being the position of the State of New York on that matter under the laws of New York.

* * * * *

216 Mr. Henry: May I again state for the record that these gentlemen are no longer officers of the IWO.

Mr. Coddair: I understand he does not contend now they are, do you? You are not entering an appearance as

an officer, you are entering an appearance as an individual?

Mr. Greene: I am doing it as both. As I explained before, we received no notice to the effect that we are no longer officers of the International Workers Order, although we did receive notice we are severed as paid officers. We are also appearing here as individuals who are members of the International Workers Order who would be affected by a decision by this Board.

Mr. Henry: I am forced to state these gentlemen have been notified they are no longer officers of the International Workers Order, and again I so notify Mr. Greene.

* * * * *

219 Mr. Greene: I am here appearing in behalf of the officers listed in this motion. I want to again restate that we are not appearing here in behalf of the IWO, Inc., which is a corporation which is now under the sole management of the New York State Insurance Department. I have only for the first time seen Judge Greenberg's order this morning. I do not think that Judge Greenberg's order or opinion around the order takes away from us as individual officers our title and our right as officers to intervene in certain issues affecting us as officers as well as individual members of the IWO.

220 That is as clear as I can make the issue in the face of the complicated problems that are involved in it.

Mr. Coddair: In other words, as I understand it now, you represent the past officers of the IWO as a group and as individuals?

Mr. Greene: I do not yield to the fact we are past officers. I know according to the order of Judge Greenberg we as officers have the right to participate in discussions and deliberations around the question of reinsurance. That right has not been taken away from us to my best knowledge.

Mr. Coddair: According to this opinion of Judge Greenberg, it has been taken away?

Mr. Greene: Frankly, I do not think so.

Mr. Coddair: Isn't the commissioner of insurance the sole trustee now?

Mr. Greene: Over the management of the affairs of the International Workers Order, yes. But if you will read Judge Greenberg's original injunction and order, it states—

Mr. Coddair: I do not care about his original one; I am talking about the one he issued December 15.

Mr. Greene: In my opinion he has not taken away from us the right as officers not to deal with the problems internally of the International Workers Order.

221 Mr. Story: I think Mr. Henry might throw some light on this subject for us.

Mr. Henry: May I state that on the argument of the appeal from Judge Greenberg's order granting the Superintendent of Insurance sole supervision, the question was rather fully explored as to whether there was any necessity for the former officers of the IWO to remain as officers because reinsurance was still pending. The Superintendent of Insurance took the position there was no such necessity, both before Judge Greenberg and before the Appellate Division.

I would therefore submit that the unanimous affirmance by the Appellate Division indicates that the pendency of a reinsurance proceeding in no sense means that these individual former officers retain any function as officers of the International Workers Order.

Mr. Greene: Just to complete the record on that question, I might say we have already had as officers, through counsel, representation in a preliminary discussion around the question of reinsurance. We are to submit a list of questions which are to be answered by the representative of the Insurance Department, following which there is to be a hearing before Judge Greenberg on the reinsurance plan.

I also want to add that no matter what decision is made on this issue, certainly as individuals who are
 222 members of the International Workers Order who stand to suffer as a result of a decision made by this Board, we certainly have a right to intervene in this proceeding.

Mr. Coddair: Are those questions still pending that he talks about, Mr. Henry?

Mr. Henry: No. The only question pending is the approval of the reinsurance plan. These gentlemen as individuals who comprise the former management have the right to appear before the referee while the reinsurance plan is being considered to present their views on the reinsurance plan, but they have not the right to appear as officers of the International Workers Order.

I would also like to say I just had an opportunity to see the motion to intervene.

Mr. Coddair: I am sorry I had not shown that to you.

Mr. Henry: I just read it, and I would like to make it clear that to the extent that Mr. Greene moves to intervene on behalf of the members of the IWO, he, of course, has no authority whatever to do so, whatever he may wish to do as an individual.

Mr. Coddair: You say they still have the right to take part in conferences on the question of reinsurance?

Mr. Henry: That is right, as individuals.

Mr. Coddair: Where does it say that in the
 223 opinion? I have not seen that.

Mr. Henry: That particular question, I am not sure—

Mr. Coddair: Was that a reservation made by Judge Greenberg in his order?

Mr. Henry: That is a reservation contained in the original order of August 24, 1951, and which is still in effect. That is, that these officers as individuals, these former officers, have a right to appear before the referee and present their views as to any reinsurance plan which is submitted.

I might also say there have been interveners in the New York State proceeding, a so-called International Workers Order Policyholders Protective Committee, which are theoretically independent from the International Workers Order. This group also has a right to appear before the referee and submit its views on the reinsurance plan.

Mr. Coddair: You stated this morning you had given them a notice yesterday that they had all been discharged. Is that an individual notice to the officers? How was that notice given?

Mr. Henry: The notice was given verbally to whatever officers and organizers were on the premises at 80 Fifth Avenue. Just what further steps in the way of written notice have been taken by the Superintendent's
224 special deputy, I am not sure.

Mr. Coddair: You said you gave them the notice yesterday, did you not?

Mr. Henry: I did not say I personally gave them the notice. The notice was given by the designee of the Superintendent of Insurance, Mr. William Carline, who has been for three years in supervision of the business.

Mr. Coddair: In other words, in addition to this opinion of Judge Greenberg's yesterday, there is still outstanding another opinion which gives these men certain rights in this corporation; namely, the right to be present at the conferences on reinsurance?

Mr. Henry: There is an order outstanding which gives them the right to be present at reinsurance hearings. I would not construe that to be a right in the corporation.

* * * * *
259 Mr. Williams. * * *

* * * * *
260 The Superintendent, since joint control was ordered on December 15, 1950, has had seven representatives of the insurance department at the main office of the International Workers Order and has super-

vised the insurance funds and insurance functions of the IWO and has countersigned all checks.

Now, later, that is, from the date of Judge Greenberg's order ordering the dissolution of this organization on August 24, 1951, we have had twenty representatives of the insurance department at the main office of the IWO. Since the denial of certiorari by the Supreme Court of the United States—

Chairman Herbert: Might I interrupt for a moment?

Mr. Williams: Yes, your Honor.

Chairman Herbert: Counsel for the Attorney General read excerpts from the order of August 1951. My recollection was that he was seeking to distinguish the fact that that order did not order the dissolution of the respondent.

Mr. Williams: I see what your Honor is getting to. You are quite right. The order was an order of dissolution, but it was stayed pending the appeal.

In other words, the company was not dissolved. The court, after the trial, ordered the company dissolved, but, then, as is customary where there are any questions
261 of law involved which have to be passed on by a higher court, the court says:

"My order of dissolution is stayed pending your taking the appeal, pending a decision by the higher court".

So all we did then was to tighten the joint control which we already had, but the organization was kept alive and the corporate organization is alive today for a single purpose, and Mr. Story is quite right about it, the corporation is still alive today, but for one purpose and for one purpose only, and that is to effect the reinsurance of the individuals who were formerly members of the International Workers Order and who hold insurance policies.

Now, I say we have, since December 15, 1953, forty representatives or approximately one-half of the entire staff of the main office of the IWO. Now, I say this about the main office of the IWO and the control which we exercise at the top because of the next statement that I am about to make.

Neither the Superintendent nor his representatives have attended or attempted to police or supervise the meetings of some seventeen hundred lodges in seventeen states and the District of Columbia. However, all subversive activity was enjoined by the court in its order of August 24, 1951.

Indeed, prior to that by the order to show cause on December 15, 1950, I believe that all subversive
262 activity was enjoined.

Now, when I say that the court enjoined it, there was no method by which any subversive activity could have been detected or punished or brought to the court's attention. So what I am saying in effect is that the Superintendent of Insurance was charged with the countersignature of checks; was in joint control of the International Workers Order at the top level. The officers could not do anything without the approval of the Superintendent of Insurance.

Chairman Herbert: In a financial way?

Mr. Williams: In a financial way, and, further, your Honor, in other ways. That is at the top we had a representative present at executive committee meetings to see that there was no subversive activity, no resolutions were adopted, at the top, although we did not approve or disapprove of fraternal activities. Social activities and fraternal activities were continued, I suppose with the approval of the Superintendent of Insurance.

We did not enter any objection to that sort of activity. We did not oppose certain traveling that was considered necessary by officers of the International Workers Order for fraternal purposes and also in order to keep alive the insurance policies, because we didn't want thousands of members of the International Workers Order who themselves might not be communists to be hurt in a
263 financial way. But we had no way of policing the seventeen hundred lodges. That is the point I am making.

* * * * *

274 Mr. Cain: My question came obviously from a very disturbing factor to me, that it appears to me that the Superintendent of Insurance in so far as the State of New York is concerned, is pretty well convinced that this organization has abandoned its prior practices. But the seventeen hundred lodges throughout this country create a problem that goes far beyond the confines of the State of New York.

Mr. Williams: May I address myself to that question for a moment?

I don't think the Superintendent of Insurance has taken any position as to whether the organization comprising these various individuals or the individuals themselves have abandoned their activities or, let us say, their communist views. The only position that the Superintendent takes as of now, and for some time past at the top
275 level we supervised and guarded against any communist activity and protected the insurance funds of the organization so they weren't siphoned off for the benefit of the Communist Party.

What happened below, we don't know, and we probably never will know.

* * * * *

276 Chairman Herbert: Mr. Williams, the Superintendent of Insurance today has sole custody of all the books of the respondent organization?

Mr. Williams: Yes, your Honor.

Chairman Herbert: So that only the Superintendent today knows who the officers of the various lodges were as of a year ago? Is that correct?

Mr. Williams: May I confer with Mr. Henry on that point?

277 Mr. Henry: In general we know who the financial officer of each lodge was, but not necessarily all of the other officers of the lodge. We have all the books at the top level.

I might say just to clarify this question of the dissolution of the lodges, under article 66 of the constitution and bylaws of the International Workers Order the general council of that organization had the power to dissolve lodges and that article also declared that all records and assets of the lodges belonged to the corporation.

Therefore, on getting sole supervision the Superintendent of Insurance dissolved all the lodges and instructed—

Chairman Herbert: As of what date?

Mr. Henry: As of December 15, 1953. And dissolved all the lodges and instructed all the officers to forward all assets and records to the national office.

As of last Thursday approximately three hundred lodges had actually submitted their records and assets or an accounting of some sort to the Superintendent.

Chairman Herbert: When all the lodges of the respondent organization have complied with the orders of the Superintendent as of December 15, 1953, then the Superintendent will be the sole person that has the custody of all the records of all the subordinate lodges of the organization.

Mr. Henry: At that time the Superintendent
278 should have possession of every piece of paper that was connected with the organization.

* * * * *

Miss McHale: Mr. Williams, I wonder if every scrap of paper to which Mr. Henry referred is in reference to all information or just financial.

Mr. Williams: I think it is just financial.

Mr. Henry: No, that would be all records; that would be records of the International Workers Order of any of its subsidiary organizations, whether relating to financial or fraternal activities.

279 Miss McHale: I have one other question. Before this contemplated date of dissolution, or the possible

extension, will you expect a return from each of the lodges in reference to all the names and papers and so on?

Mr. Henry: Yes, we do.

Miss McHale: If you didn't get all of them, what then?

Mr. Henry: As a matter of fact, we have at the present the membership of all the lodges, which, of course, is necessary to transfer the insurance of the members. If we don't get the records from a particular lodge, of course, we will follow up in whatever seems the best way until we do get them.

* * * * *

BRIEF FOR PETITIONER

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 12,135

FILED

JUL 22 1954

Joseph W. Stewart
CLERK

DAVE GREENE, RUBIN SALTZMAN, ROCKWELL KENT,
PETER SHIPKA, SAM MILGROM, PAULINE OSSIP and
ZEBEDEE COLLINS,

Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

On Review of Order of the Subversive Activities Control Board.

JOHN J. ABT,
11 Park Place,
New York, N. Y.

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QUESTIONS PRESENTED.

1. Whether the action of the Subversive Activities Control Board in denying motions of the Petitioners, officers and members of the International Workers Order, Inc., for leave to intervene in and defend a proceeding to require the I. W. O. to register as a "Communist-front organization," and in issuing (and thereafter refusing to vacate) a default order requiring the I. W. O. to register as a "Communist-front" organization violated the Administrative Procedure Act and the Internal Security Act of 1950.

2. Whether the Board erred in ruling that the Petitioners did not have standing to intervene in and defend the proceeding on behalf of all other members of the I. W. O., as a class.

3. Whether the order of the Board violated the Fifth Amendment by imposing sanctions and disabilities on the Petitioners and all other members of the I. W. O., depriving them of liberty and property, without a hearing.

4. Whether the order of the Board was authorized by section 13(d)(2) of the Internal Security Act of 1950.

5. Whether Petitioners are "parties aggrieved" by the order of the Board within the meaning of section 14 of the Internal Security Act of 1950.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 12135.

DAVE GREENE, RUBIN SALTZMAN, ROCKWELL KENT, PETER
SHIPKA, SAM MILGROM, PAULINE OSSIP and ZEBEDEE COL-
LINS,

Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

On Review of Order of the Subversive Activities Control Board.

BRIEF FOR PETITIONERS.

JURISDICTIONAL STATEMENT.

This case presents for review an order of the Subversive Activities Control Board (J. A. 51-52)¹ that the International Workers Order, Inc. (herein called the I. W. O.) register as a "Communist-front" organization under

¹ We use "J. A." to refer to the Joint Appendix and "R." to refer to the original transcript of the record on file with the Court.

section 7 of the Internal Security Act of 1950 (herein called the Act), 64 Stat. 993, 50 U. S. C. 786.

The Board's jurisdiction arose under section 13 of the Act, 64 Stat. 998, 50 U. S. C. 792, by virtue of a petition filed by the Attorney General of the United States with the Board praying for an order requiring the I. W. O. to register as a "Communist-front" organization.

The jurisdiction of the Court arises under section 14 of the Act, 64 Stat. 1001, 50 U. S. C. 793. Jurisdiction was invoked by the filing by Petitioners of a joint and several petition to review and set aside the order of the Board.²

STATEMENT OF THE CASE.

Preliminary Statement of the Issue.

The Petitioners Greene, Saltzman, Shipka, Milgrom and Kent (herein called officer-Petitioners) are elected officers and members of the I. W. O. (J. A. 36.) The Petitioners Ossip and Collins (herein called member-Petitioners) are members of the I. W. O. (J. A. 53, 56.)

Each group of Petitioners sought to intervene in and defend the proceeding before the Board on their own behalf and on behalf of all other members of the I. W. O. (J. A. 36, 52-53.) At the time that intervention was sought, the I. W. O. was under the sole management and control of the Superintendent of Insurance of the State of New York who refused to defend the proceeding before the Board. (J. A. 41-43.)

The officer-Petitioners filed their motion for leave to intervene prior to the entry of the Board's order directing the I. W. O. to register. The Board denied this motion and, in the absence of any appearance by the I. W. O., entered a registration order against it by default. (J. A. 51-52.) Shortly thereafter, the member Petitioners filed their motion to vacate the registration order and for leave to in-

² The considerations which require the order of the Board to be set aside also determine the jurisdiction of this Court. See, *infra*, p. 59.

tervene and defend. The Board denied this motion. (J. A. 62.)

Both groups of Petitioners asserted that they were entitled to intervene as of right on the following grounds (J. A. 44, 58-59):

1. That a registration order against the I. W. O. would automatically result in the imposition of serious sanctions and disabilities against Petitioners and all other I. W. O. members.

2. That since the I. W. O. was not defending the proceeding, the interests of Petitioners and the other members were not represented in the proceeding.

3. That there was a complete defense on the merits to the Attorney General's petition which Petitioners were prepared, if permitted, to assert and prove.

The petition for review, in essence, challenges the action of the Board in denying the motions for leave to intervene and in entering (and thereafter refusing to vacate) the default registration order against the I. W. O.

The Act.

The Act provides for administrative proceedings before the Board, upon petitions of the Attorney General, to determine whether or not accused organizations shall be required to register as "Communist-front" organizations. (Sec. 13.)

By definition, a "Communist-front" organization is an organization which "(A) is substantially directed, dominated or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization . . ." (Sec. 3(4).)

A "Communist-action" organization is defined as an organization which "(i) is substantially directed, dominated, or controlled by the foreign government or foreign organi-

zation controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title." (Sec. 3(3).) Section 2, referred to in this definition, describes the world Communist movement as a world wide seditious conspiracy, under the control of an unnamed foreign government, which seeks by unlawful means "to establish a Communist totalitarian dictatorship in the countries throughout the world."

Sections 13(g) and (h) direct the Board to determine whether an accused organization "is" or "is not" a "Communist-front" organization—*i.e.*, whether it is or is not such an organization at the time the proceeding is had and the order of the Board is issued. An organization found by the Board presently to be a "Communist-front" organization is required to register with the Attorney General and supply him with information as to the identity of its officers and a detailed financial accounting. (Sec. 7(d).)

The failure of an organization to register when required by a final registration order³ is punishable by severe cumulative criminal penalties against its officers. (Secs. 7(h), 15.)

The entry of a final registration order against a "Communist-front" organization makes operative a series of crippling sanctions and disabilities against the organization and its members, *whether or not the organization registers*. Thus, when a registration order against an organization becomes final:

1. It is unlawful for the members to hold non-elective federal employment. (Sec. 5.)

2. It is unlawful for the members to apply for or hold passports. (Sec. 6.)

3. Non-citizen members are excluded from admission to the United States. (Originally, Sec. 22 of the Act; now

³ A registration order becomes final upon the exhaustion of judicial review. (Sec. 14(b).)

Sec. 212(28)(E) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 182, 8 U. S. C. 1182.)

4. Non-citizens residing in the United States who are or have been members of the organization must be deported. (Originally, Sec. 22 of the Act; now Sec. 241(a)(6)(E) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. 1251.)

5. Non-citizens may not be naturalized if they were members of the organization within ten years of the filing of their petitions for naturalization. (Originally, Sec. 25 of the Act; now Sec. 313(a)(2)(H) and (c) of the Immigration and Nationality Act, 66 Stat. 240, 8 U. S. C. 1424.)

6. Citizens naturalized after January 1, 1951 who, within five years after naturalization, become members of the organization, are subject to the revocation of their citizenship. (Originally, Sec. 25 of the Act; now Sec. 340(c) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. 1451.)⁴

The I. W. O.

The I. W. O. is a fraternal benefit society organized as such under the New York insurance laws. It has approximately 100,000 members, who are also holders of insurance policies issued by the I. W. O., and who reside in many states. Some members are non-citizens. Some members have been naturalized since January 1, 1951. Some members are employees of the federal government. (J. A. 53-54.)

In December 1950, the Superintendent of Insurance of the State of New York (herein called the Superintendent) filed an action in the Supreme Court of New York for the dissolution of the I. W. O. on the ground that it was a financial hazard within the meaning of the New York Insurance law in that it was alleged to be dominated and

⁴ The sanctions imposed upon the organization (as distinct from the members) are not material here.

controlled by the Communist Party. (J. A. 32.) By an order of the New York court entered upon the commencement of that action, the Superintendent was placed in joint control with the officers of the I. W. O. of the business and affairs of the organization, and the officers were restrained from acting for the organization without the prior approval of the Superintendent and the court. Upon the entry of this order, the Superintendent sent a staff of his employees to the headquarters of the I. W. O., and thereafter the insurance business and the fraternal activities of the I. W. O. were only such as were authorized by the Superintendent. (R. 141-142.) The situation, as stated by the New York court, was that the I. W. O. was "under the complete judicial supervision of this court" and "under the active daily control of the Superintendent of Insurance of the State of New York." (R. 139.) Supervision and control of the I. W. O. continued in this form until December 15, 1953. On that date, pursuant to a further order of the New York court, the joint supervision was terminated, the officers ousted from further participation in the affairs of the I. W. O., and the Superintendent placed in sole control pending the effectuation of reinsurance and the dissolution of the organization. (J. A. 33.)⁵

The Administrative Proceeding

On April 22, 1953, the Attorney General filed his petition with the Board praying that the I. W. O. be ordered to register as a "Communist-front" organization (R. 354-69), and on August 21, 1953 filed an amended petition (J. A. 11-23), both under verification. The petition and amended petition alleged that the Communist Party of the United States was a "Communist-action" organization as defined in the Act, and had been ordered to register as such by

⁵ The I. W. O. currently remains in this status. There is presently pending before the New York court a motion to confirm and objections to a referee's report recommending a plan of reinsurance.

the Board.⁶ It further alleged that "the I. W. O. has been *and is* substantially directed, dominated and controlled by the Communist Party and has been *and is* primarily operated for the purpose of giving aid and support to the Communist Party." (J. A. 13; emphasis supplied.)⁷

The amended petition (like the petition) made no mention of the New York proceeding or of the fact that for the preceding two and one-half years, the I. W. O. had been and still was under the supervision of the New York Court and the daily control of the Superintendent. On the contrary, to the extent that the allegations of the amended petition identifiably alleged present as distinct from past conduct, they included such statements as that "the [Communist] Party has guided and directed *and continues to guide and direct* the internal affairs and formulation of the policies of the I. W. O." (J. A. 14; emphasis supplied.)

Immediately after the Petition was filed, the Superintendent attempted to persuade the department of Justice and the Board to abandon the action on the ground that its prosecution would create serious problems in connection with the New York dissolution proceeding. Failing in this, he authorized the retention of counsel by the I. W. O. to represent it in preliminary procedural matters before the Board. (R. 162-3.)

Thereafter, the I. W. O. made a series of preliminary motions, including motions attacking the constitutionality of the Act and the failure of the petition to conform to the Act's requirements. (J. A. 37; R. 386-96.) After the denial of these motions and an unsuccessful effort to enjoin the proceeding in the United States District Court, the I. W. O. filed an amended answer. (J. A. 38-39.) The

⁶ This order of the Board has not become final, since it is the subject of a pending petition for review in this Court. *Communist Party of the United States v. Subversive Activities Control Board*, No. 11,850.

⁷ Section 13(a) of the Act requires the petition to allege that the accused organization "is" a Communist-front organization at the time the petition is filed.

amended answer, among other things, denied the allegations of the amended petition that the I. W. O. was substantially directed, dominated and controlled by the Communist Party and that it was primarily operated for the purpose of giving aid and support to the Communist Party. It alleged, affirmatively, that from Decemebr 15, 1950 to the date of the amended answer, the I. W. O. had been operated under the joint management of its officers and the Superintendent, pursuant to the order of the New York court. (J. A. 25-26.)

On November 3, 1953, the Board noticed the matter for the taking of evidence on December 1. (J. A. 39.) The I. W. O. officers thereupon requested the Superintendent to authorize the retention of counsel to represent the organization at the hearing. The Superintendent declined to do so, and asked the officers not to apply to the court for such authority inasmuch as he was attempting to persuade the Attorney General to secure a continuance. (R. 296.) Discussions between the Superintendent and the Attorney General eventuated, on November 27, in a motion by the latter to postpone the hearing until January 4, 1954. On November 30, the Board denied this motion and ordered the hearing to proceed as scheduled on the following day. (J. A. 39; R. 622-26.)

On the next day, December 1, the officers filed a motion in the New York proceeding for leave to retain counsel to represent the I. W. O. in the hearing before the Board. On the same day, the Attorney General, who four days earlier had requested a continuance, appeared before the Board and moved for a default registration order. However, on being informed of the officer's motion in the New York proceeding, the Board continued the matter to December 10. (J. A. 40.)

The New York Court did not immediately rule upon the motion of the officers. Instead, it addressed a letter to the Board, stating that the officers' motion presented serious legal problems and a possible conflict between state

and federal authority and requesting a ninety day postponement of the hearing. (J. A. 40; R. 138-40.)

The court's letter was presented to the Board at the reconvened hearing on December 10. On the same day, the Attorney General renewed his motion for a default order. The Board reserved decision, and on the following day denied the postponement requested by the New York court, set the hearing for the presentation of evidence for December 16, and informed the New York court by letter that, if the I. W. O. was not represented on that day, it would grant the Attorney General's motion for a default order. (J. A. 40-41; R. 214-15.)

On December 15, the order of the New York Court became effective, terminating the joint management of the I. W. O., and vesting sole control in the Superintendent. (J. A. 33.) On the same day, the court denied the motion of the I. W. O. officers for leave to retain counsel to represent the I. W. O. in the hearing before the Board. The court fully understood, as stated in its opinion, that this action would result in the issuance by the Board of a default order against the I. W. O. on December 16 "for the non-appearance of the Respondent [I. W. O.], and that non-appearance will be due solely to the restraining order of this court." (J. A. 35-36.) The opinion continued (J. A. 36):

"This would seem to present an intolerable situation, and yet it is the end result of the refusal of the Board to recognize orderly procedure in this jurisdiction and to accord the State of New York the recognition that it is entitled to on the basis of comity. The Board itself, after a long period of lethargy, has suddenly decided that haste is desirable. Agreed. But justice is indispensable. The courts of New York have already written an end to the Respondent and have ordered its liquidation.

"The only remaining phase is to transfer the assets to another insurance company and to provide for re-insurance. All of this has been done and is being done, while observing due process of law. However, this

court has no recourse but to deny the motion of the Respondent for funds with which to retain counsel on the ground that in legal contemplation the corporate respondent has ceased to exist and, therefore, may no longer be represented by counsel of its own choice."

The Motion of the Officer-Petitioners for Leave to Intervene.

At the hearing on December 16, counsel for the Superintendent appeared for the sole purpose of presenting the order and opinion of the New York court, issued the previous day, and advising the Board that the Superintendent has assumed sole control of the I. W. O. The Attorney General thereupon renewed his motion for a default judgment. (J. A. 41, 42.)

Two of the officer-Petitioners, Greene, General Recording Secretary, and Saltzman, General Vice-President, appeared in person, without counsel, and moved to intervene on their own behalf and on behalf of the other officer-Petitioners, Kent, General President, Shipka, General Secretary-Treasurer, and Milgrom, Executive Secretary, on their own behalf as officers and members of the I. W. O., and on behalf of the other members of the I. W. O. The motion stated that it was made in order to permit the applicants "to defend fully against the charges of the Attorney General and to resist his demand that the I. W. O. be required to register under the McCarran Act." The motion further stated that the grounds therefor were that the applicants, together with all other members of the I. W. O., "are directly and personally affected by these proceedings and will suffer the most serious legal and personal consequences if the Board decides in favor of the Attorney General." (J. A. 36-37, 41-42.)

This motion and the Attorney General's motion for a default order were set down for argument before the Board on January 4, 1954. (J. A. 42.)

On that date, counsel for the Superintendent, appearing specially, advised the Board (1) that the Superintendent would not defend or authorize anyone else to defend the

I. W. O. in the proceeding, and (2) that while the Superintendent did not approve the entry of a default order against the I. W. O., he did not and would not oppose it. (J. A. 42-43; R. 233.)

The officer-Petitioners were represented by counsel who urged that they were entitled as of right to intervene on their own behalf and on behalf of the members of the I. W. O. as a class. In support of that position, he pointed out that the entry of a registration order against the I. W. O. would result in the imposition of the following sanctions upon the officer-Petitioners and upon the other members of the I. W. O. (R. 323-6; J. A. 44):

1. The officer-Petitioners, as officers, would be subject to the cumulative criminal penalties of section 15 of the Act in the event of the failure of the I. W. O. to register as a "Communist-front" organization.
2. Each of the officer-Petitioners and each of the other members of the I. W. O. would, as members, be subject to one or more of the disabilities imposed by the Act with reference to federal employment, passports, deportation, naturalization and the revocation of naturalization.⁸

Counsel stated that in the event the motion to intervene was granted, the intervenors would adopt the answer filed by the I. W. O. and would defend the proceeding on the basis of that answer. (R. 304.)⁹

In opposing the officer-Petitioners' motion for leave to intervene, counsel for the Attorney General did not dispute the proposition that a registration order would give rise to the sanctions enumerated above against the officer-Peti-

⁸ See pp. 4-5, *supra*, for a description of these sanctions.

⁹ As we have noted, the answer of the I. W. O. denied that it was a "Communist-front" organization and affirmatively alleged the facts with reference to the control of the organization by the Superintendent of Insurance pursuant to the December 1950 order of the Supreme Court of New York. See *supra*, pp. 7-8.

tioners and the other members of the I. W. O. His opposition was limited to the following grounds: (1) That he had not received notice of the motion; (2) that the purpose of the applicants in seeking intervention was not to defend the proceeding, but to secure its continuance or dismissal; and (3) that in the absence of any appearance by the I. W. O., intervention was improper because it would amount to a substitution of respondents without the consent of the petitioner. (J. A. 44.)¹⁰

In addition to opposing intervention, the Attorney General pressed his motion for a default registration order, urging (J. A. 43; R. 237) that it was authorized under section 13d)(2) of the Act which provides that where an organization "declines or fails to appear at a hearing accorded to such organization . . . the Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization . . . to register. . . ."

The Order and Report of the Board.

On January 14, 1954, the Board entered the order involved herein, ordering the I. W. O. to "register as a Communist-front organization under and pursuant to Section 7 of the Act." At the same time, the Board issued a report denying the officer-Petitioners' motion to intervene and stating its reasons therefor. (J. A. 37-52.)

The report first denied the motion of the officer-Petitioners to intervene on behalf of all of the members of the I. W. O. as a class. It based its decision on "official notice" of alleged facts contained in an opinion rendered by the Supreme Court of New York in the dissolution proceeding. The Board stated that, "These facts as found by the New York Court have come to the attention of this Board in the official course of its duties regarding the subject pro-

¹⁰ These contentions are patently frivolous and, as we shall see, were not adopted by the Board which was compelled to search out entirely different grounds in an effort to rationalize its denial of intervention.

ceeding.” (J. A. 48.) The opinion of the New York Court, however, had never previously been referred to by the Board or by any of the parties, and the first mention of it in the entire proceedings occurred in the report.

The “facts” which appear from the portions of this opinion which were quoted by the Board consisted of the following statements of the court (J. A. 45-48):

1. That four of the officer-Petitioners (Greene, Saltzman, Shipka and Milgrom) “have been identified as active Communist Party members” and “as having participated in key Communist Party committees,” and that “the evidence points convincingly to the fact of their membership in the Communist Party.”
2. That the writings of the fifth officer-Petitioner (Kent) “reveal a very active sympathy with and support of Communist ideas and the U. S. S. R.”
3. That “there is no doubt from the evidence that many members of the I. W. O. were not Communists or even clearly aware of the ties between the I. W. O. and the Communist Party.”

After quoting these statements of the New York court, the Board stated, without discussion, that, “It appears from the foregoing that the applicants, all former officers, have interests foreign to and, indeed, conflicting with, those of the rank and file members of [the I. W. O.] whom they here seek to represent.” The Board concluded from this that the applicants could not represent the other members as a class in the proceeding before the Board. (J. A. 48.) ¹¹

¹¹ The Board also mentioned two additional propositions to support this ruling: (1) That no showing was made that the other I. W. O. members had notice of or had acquiesced in the request for class intervention; and (2) that the Superintendent opposed the class intervention and represented to the Board that the officer-Petitioners had no authority to represent the class and might be in violation of the New York court’s order in attempting to do so. (J. A. 48.) As we shall show, the first proposition is unfounded in law and the second is without basis in fact since the Superintendent made no such representation to the Board. See *infra*, pp. 50-51.

The report next turned to the question of the right of the officer-Petitioners to intervene in their own behalf.

It first concluded, without discussion, that the officer-Petitioners would not be subject to criminal liability for the failure of the I. W. O. to register in response to an order. (J. A. 49.)¹²

It then found that "it is a matter of public record, as found in the New York decision, *supra*, that all applicants except Mr. Kent are active members of the Communist Party. . . ." (J. A. 49.) Hence, the report stated, "under existing Federal law and regulations," all of the applicants, except Kent, were already subject to or "in jeopardy of" all of the sanctions that they would incur from an order of registration against the [I. W. O.]." (*Ibid.*)¹³

As to the fifth officer-Petitioner, Kent, the report stated that, "it is apparent from the aforementioned New York State proceeding, that he is immersed in Communist activities to the extent that he is also presently in jeopardy regarding these so-called 'rights.' " (J. A. 49-50).¹⁴ The report added as to Kent that, "In fact, it is a matter of record in the Department of State that he has twice been denied a passport by that Department in recent years." (*Ibid.*) This "matter of record" was not mentioned in the proceeding before the Board. The only reference to it appears in the report, and the report is silent as to the circumstances under which or the grounds on which a passport was allegedly denied.

On the basis of the foregoing, the Board concluded that, "under all the circumstances here presented we find that

¹² The report makes no reference to the contrary position of the Attorney General (see *infra*, p. 40) who, of course, is charged by law with authorizing criminal proceedings.

¹³ The report added that the officer-Petitioners, other than Kent, were also "in jeopardy of those sanctions" by virtue of the Board order that the Communist Party register. (*Ibid.*) As already noted, that order is pending on a petition to review in this court. See note 6, p. 7, *supra*.

¹⁴ *I. e.*, the rights and privileges denied to members of organizations ordered to register under the Act.

the applicants are not entitled as of right, and should not in the discretion of the Board, be permitted to intervene in this proceeding." Accordingly, the report stated, the Board "is left with no alternative but to grant [the Attorney General's] motion for a default order under section 13(d)(2) of the Act." (J. A. 50.)

The Motion of the Member-Petitioners for Leave to Intervene.

As stated above, the order of the Board directing the I. W. O. to register was issued on January 14, 1954. On February 1, 1954, the member-Petitioners (Ossip and Collins) moved the Board: (1) to grant them leave to intervene on behalf of themselves and all other I. W. O. members; (2) to vacate the registration order of January 14, 1954; and (3) to set the proceeding down for a hearing to examine witnesses and receive evidence pursuant to section 13(c) of the Act. (J. A. 52-53.)

Affidavits of the member-Petitioners, filed in support of their motions, recited the following facts (J. A. 53-57):

1. That the member-Petitioners were United States citizens and members of the I. W. O.; that neither of them was or had been a member of the Communist Party, and that both were eligible to apply for and hold non-elective federal office and to apply for and receive passports.
2. That many I. W. O. members were non-citizens, some of whom had applications for naturalization pending and others of whom intended to apply for naturalization; that some citizen-members were naturalized subsequent to January 1, 1951; that some members were federal employees, and that many members were eligible to apply for and hold federal employment and to apply for and receive passports.
3. That unless the motion to intervene was granted and the Board's registration order set aside, the

member-Petitioners and all other I. W. O. members would be subject to one or more of the sanctions of the Act with reference to federal employment, passports, deportation, naturalization and revocation of citizenship.

4. That the members of the I. W. O. were so numerous that it was impractical to join them in the proceeding; that many were unaware of the pendency of the proceeding and its effect on their rights, and others were unaware of the refusal of the Superintendent to defend or of the entry of a default registration order.
5. That Ossip did not learn of the refusal of the Superintendent to defend the proceeding or of the Board's denial of intervention to the officer-Petitioners and the entry of the default order until January 27, 1954, and that Collins did not learn of these facts until January 18, 1954.

In addition to the foregoing, the affidavits denied that the I. W. O. was a "Communist-front organization", recited the facts with reference to its supervision and control by the New York court and the Superintendent, and stated that if permitted to intervene, the member-Petitioners would assert and prove these defenses to the petition. (*Ibid.*)

On February 11, 1954, the Attorney General filed a memorandum in opposition to the motion of the member-Petitioners. No counter-affidavits were filed, and the facts stated in the Ossip and Collins affidavits were not otherwise controverted. The memorandum in opposition stated only: (1) that "no showing has been made which would alter the status of this proceeding to justify vacating the order of the Board;" and (2) that the motion "is nothing more than an attempt on the part of these individuals to substitute themselves and others for the Respondent

[I. W. O.],” and “is without legal precedent.” (J. A. 57.)

The Memorandum Opinion and Order of the Board.

On March 4, 1954 the Board issued a memorandum opinion and order denying the motion of the member-Petitioners for leave to intervene. (J. A. 58-62.) The memorandum opinion disposed of the class aspect of the member-Petitioners' motion by stating: (1) that they made “no showing that they would sufficiently represent the other members of the I. W. O. as a class or that there is a class susceptible of such representation,” and (2) that the I. W. O. members as a class “are now only competently represented by the Superintendent.” (J. A. 61-62.)

The memorandum opinion denied intervention to the member-Petitioners, on their own behalf, on the grounds: (1) that they made no showing that they had applied for federal employment or passports, or intended to do so, and (2) that their eligibility for such employment and passports “is highly questionable” because of the finding of the New York court that the I. W. O. had been Communist-controlled. Additionally, the memorandum opinion suggested that the motion for leave to intervene was not timely filed, and that the applicants had made no showing that they were in possession of evidence sufficient to prove the defenses which they were asserting. (J. A. 62.)

STATUTES INVOLVED.

The pertinent statutes appear in the supplement to this brief.

STATEMENT OF POINTS.

1. The action of the Board in denying Petitioners' motions to intervene in and defend the proceeding on their own behalf violated the Administrative Procedure Act and the Act.

2. The Board erred in ruling that the Petitioners did not have standing to intervene in and defend the proceeding on behalf of the other members of the I. W. O. as a class.

3. The order of the Board violated the Fifth Amendment by subjecting the Petitioners and all other members of the I. W. O. to sanctions and disabilities that deprived them of liberty and property without a hearing.

4. The order of the Board was not authorized by section 13(d)(2) of the Act, providing for default orders.

5. Since the Petitioners were "parties aggrieved" by the order of the Board, they have standing to petition this Court to review the order.

SUMMARY OF ARGUMENT.

I.

The action of the Board in denying Petitioners' motions to intervene in and defend the proceeding on their own behalf violated the Administrative Procedure Act and the Act.

Section 2(b) of the Administrative Procedure Act (made applicable to proceedings before the Board by section 16 of the Act) provides for intervention in agency proceedings by defining the term "party" to include any person "properly seeking and entitled as of right to be admitted as a party." Rule 24(a) of the Federal Rules of Civil Procedure, concededly applicable to administrative proceedings, provides that intervention shall be allowed, as of right, where the application is timely, the representation of the applicant's interest is inadequate, and the applicant is or may be bound by the judgment in the action.

The Board's denial of intervention and its issuance of a registration order against the I. W. O. without a hearing on the facts was based primarily on the ground that neither the officer-Petitioners nor the member-Petitioners would be adversely affected or bound by the order. This

ruling is completely untenable as to both groups of Petitioners.

A. A final registration order against the I. W. O. would adversely affect and be binding on the officer-Petitioners, first, in their capacity as members and, second, as officers of the organization.

1. A final registration order would, by virtue of sections 5 and 6 of the Act, automatically make the officer-Petitioners, as members of the I. W. O., ineligible to receive passports or hold federal employment. Moreover, the officer-Petitioners would be bound by the order in any prosecution for the crimes of applying for a passport or holding federal employment with notice of the issuance of a final registration order against the I. W. O. (Sections 5, 6 and 15 of the Act.) Accordingly, it would seem beyond dispute that the officer-Petitioners, as I. W. O. members, would be injured and bound by a final registration order, and hence were entitled, as of right, to intervene. The Board's decision to the contrary was based on the assertion that the officer-Petitioners would not be harmed by the registration order because four of them were "active members of the Communist Party" and the fifth (Kent) had revealed "sympathy and support" for Communist ideas and, therefore, "under existing federal laws and regulations" were already subject to or "in jeopardy of" all of the sanctions and disabilities with reference to Federal employment and passports which a registration order would entail.

a. Assuming, *arguendo*, the validity of the Board's factual premise that four of the officer-Petitioners were members of the Communist Party, its decision as to them was erroneous in two respects.

First, a final registration order against the I. W. O. would impose more onerous disabilities and sanctions on the four officer-Petitioners, as members of the organization, than those presently imposed on Communist Party members under "existing federal laws and regulations."

Thus, section 5 of the Act makes members of an organization ordered to register as a "Communist-front" unconditionally ineligible for federal employment, while under Executive Order 10450 and the action of the Attorney General in listing the Communist Party as a subversive organization, Communist Party membership is simply one factor which may or not be helpful in determining the question of eligibility in a particular case. Also, section 6 of the Act makes it a criminal offense for a member of an organization, with notice of the registration order, to apply for a passport, while the State Department regulations denying passports to Communists (22 C. F. R. 51.135) impose no penalties for applications by Communists. Thus, a Communist is free to test the validity of the regulations without risk, while a member of an organization ordered to register may challenge section 6 only by applying for a passport and risking conviction if his challenge fails.

Secondly, the four officer-Petitioners in question would suffer injury (in the legal sense) from a registration order even if its consequences were identical with those to which they were already subject under existing law. The Board's assumption that where an individual is subject to the sanctions of one law, he suffers no harm by having the same sanctions imposed upon him under a second law is patently untenable. By the Board's logic, a defendant could be given a life sentence for kidnapping, without a trial, on the ground that he was already serving a similar sentence under a prior conviction for murder.

The Board adopted an even more attenuated variant of this absurd theory in denying intervention to the fifth officer-Petitioner, Kent. It asserted that Kent, although not a Communist Party member, had exhibited "sympathy with and support of Communist ideas" and, therefore, was "in jeopardy," under existing law, of the sanctions he would suffer by virtue of a registration order. Since the Board considered it possible that Kent might incur these sanctions independently of its action, it concluded that a hear-

ing was unnecessary before it removed the uncertainty by imposing the sanctions upon him unconditionally. This startling basis for dispensing with a hearing would justify the imposition of a death sentence, without trial, on the ground that the defendant had an advanced heart condition, was "in jeopardy" of death from natural causes, and therefore might not be hurt by hanging.

b. The findings of the Board, on which its denial of intervention was based, as to the Communist Party membership or sympathies of the officer-Petitioners did not purport to be based on evidence. The Board stated that they were derived from "official notice" of the contents of an opinion of the Supreme Court of New York in the proceeding brought by the Superintendent to liquidate the I. W. O. The officer-Petitioners were not parties to that action.

It was obviously improper for the Board to take official notice of the findings contained in the New York opinion. It is well settled that a court or administrative agency may, at most, take notice of facts found by itself in another proceeding between the same parties. *White v. Central Dispensary and Emergency Hospital*, 99 F. 2d 355, 358-9; 69 App. D. C. 122.

Furthermore, the action of the Board violated section 7(c) of the Administrative Procedure Act which provides that, "Where an agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." The Board gave the officer-Petitioners no opportunity to controvert the recitals of the New York opinion. The opinion was never mentioned in the arguments before the Board, and the officer-Petitioners had no notice of the Board's intention to take official notice of its contents, but were confronted by a *fait accompli* in the report.

2. A final registration order would also adversely affect and be binding upon the officer-Petitioners in their capacity

as officers of the I. W. O., since they would or, at all events might be subject to criminal sanctions for failing to register the I. W. O. in response to the order.

Sections 7(h) and 15 of the Act and the regulations of the Attorney General (28 C. F. R. 11.205) make the principal officers and members of the governing board of an organization liable to enormous cumulative criminal penalties for failing to register the organization pursuant to a final order of the Board. The Board held, however, that the officer-Petitioners would not be subject to these criminal penalties, apparently upon the theory that they were no longer officers of the I. W. O., but were "former officers." This conclusion rested exclusively upon a statement made by counsel for the Superintendent in the course of argument before the Board. It is in conflict with an opinion of the Supreme Court of New York, rendered in the liquidation proceeding and filed with the Board. Whether the status of the officer-Petitioners under New York law is such as to make them liable for failure to register the I. W. O. is a question which, at least, is not free from doubt on the record in this proceeding. Moreover, the Board did not suggest upon whom the duty to register the I. W. O. rests if it does not rest with the officer-Petitioners.

Finally, the view adopted by the Board was not shared by the Attorney General who is charged with the duty of prosecuting for non-registration and who indicated, in the course of the argument, that it was his position that the officers of the I. W. O. were under a duty to register it.

B. The member-Petitioners would suffer sanctions and disabilities from a final registration order and, therefore, were entitled, as of right, to intervene in and defend the proceeding. The Board assigned four grounds for its decision to the contrary.

The first ground was that the member-Petitioners' eligibility for federal employment and passports was "highly questionable since they are members of an organization which the New York courts . . . have found to be Com-

munist-controlled.” This proposition rests on the ridiculous theory (applied by the Board to the case of the officer-Petitioner, Kent) that intervention should be denied and the applicant deprived of a hearing wherever it appears that he may not be hurt by a registration order because of the possibility that he may suffer the identical harm independently of the order. Moreover, the Board’s assertion that the I. W. O. was Communist-controlled (like its factual premises in the case of the officer-Petitioners) was based on an opinion of the Supreme Court of New York which was not a part of the record in the proceeding, was not a proper subject for official notice, and was noticed in violation of the Administrative Procedure Act.

The other three propositions on which the Board rested its decision are equally fallacious.

1. The member-Petitioners alleged, as grounds for intervention, that they were eligible for Federal employment and passports and that a registration order would bar them from both. The Board held, however, that since the member-Petitioners did not show that they had applied or intended to apply for federal employment or passports, their interest in the proceeding was only “contingent” and therefore insufficient to support their motion.

The fallacy of the Board’s position is demonstrated by the explicit provision of Rule 24(a) that intervention is a matter of right where the applicant “is or *may be* bound” by a judgment in the proceeding. (Emphasis supplied.) Thus the rule requires intervention to be granted where the effect of the judgment depends—to use the Board’s phrase—on a contingency, and the authorities so hold.

Moreover, the injurious effect of a registration order upon the member-Petitioners was not dependent on any contingency. For the order was an immediate, unconditional and conclusive determination of their status as persons ineligible for federal employment and passports. In addition, the order immediately injured the member-Petitioners by branding them as disloyal persons. Such a find-

ing of disloyalty is impermissible without a hearing. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123.

2. The Board's suggestion that the motion of the member-Petitioners was not timely filed is unfounded. They had no grounds for intervention until it appeared that the proceeding would not be defended by the I. W. O. Their motion was filed less than one month after the Superintendent first flatly announced his intention not to defend on behalf of the I. W. O., and within two weeks after they first learned of that fact and after the Board denied intervention to the officer-Petitioners and entered the default registration order.

3. The ruling of the Board that the member-Petitioners were not only required to state a meritorious defense to the proceeding, but to satisfy the Board of their ability to prove it is preposterous.

II.

The Board erred in ruling that the Petitioners did not have standing to intervene in and defend the proceeding on behalf of all other members of the I. W. O. as a class.

Both groups of Petitioners made out a case for true class intervention under clause (1) of Rule 23 of the Federal Rules of Civil Procedure as well as for so-called "spurious" class intervention under clause (3) of the rule. An examination of the grounds for the Board's decision to the contrary with respect to each group of Petitioners demonstrates that its decision was plainly erroneous.

A. The Board based its decision as to the motion of the officer-Petitioners on four grounds.

1. The Board's ruling that the members of the I. W. O. did not constitute a class "susceptible of representation" is contrary to the precise provisions of Rule 23(a) and to the authorities.

2. The Board's assertion that the interests of the officer-Petitioners were in conflict with the interests of the rank and file members was based on "official notice" of statements contained in an opinion of the New York court with reference to alleged Communist Party membership or sympathies of the officer-Petitioners. This opinion, as already noted, was not a proper subject for official notice and was noticed in violation of the Administrative Procedure Act. Moreover, whatever their ideological differences, the interests of the officer-Petitioners and the other I. W. O. members in the subject matter of the proceeding were identical—*i.e.*, avoidance of the penalties and disabilities to both consequent upon a registration order.

3. The ruling of the Board that the officer-Petitioners were required to notify the other I. W. O. members of their intention to file a motion for class intervention is contrary to the provisions of Rule 23 and would have been impossible under the circumstances of this case.

4. The Board's assertion that the Superintendent had advised it that the officer-Petitioners had no authority to represent the other I. W. O. members was contrary to fact. It is clear that nothing in the New York proceeding barred such class representation.

B. The ruling of the Board that the member-Petitioners did not have standing to intervene on behalf of the other members as a class because "these members are now only competently represented by the Superintendent" is patently fallacious. The members were not represented by the Superintendent in the proceeding before the Board. On the contrary, the Superintendent flatly refused to defend the proceeding on behalf of the members, the I. W. O. or anyone else.

The other grounds assigned by the Board for denying the member-Petitioners' motion to the effect that there was no class "susceptible of representation" and that the member-Petitioners did not adequately represent the class

have already been disposed of in discussing the class aspect of the officer-Petitioners' motion.

III.

The order of the Board subjected the Petitioners and all other members of the I. W. O. to sanctions and disabilities which deprive them of "liberty and property" within the meaning of the Fifth Amendment. Yet the Board entered its order *ex parte* in the face of Petitioners' timely demand for a hearing in which they could interpose a defense. There could be no more flagrant denial of the elementary requirements of due process.

IV.

The order of the Board was not authorized by section 13(d)(2) of the Act, providing for default orders.

A. Section 13(d)(2) obviously was not intended to and could not authorize the entry of a default order which, as we have shown, violated the Fifth Amendment and the Administrative Procedure Act.

B. Section 13(d)(2) does not authorize a default order where, as here, the Board knew that the material allegations of the Attorney General's petition were false. The issue before the Board was the current character of the I. W. O.—*i.e.*, whether it was dominated and controlled by and operated for the purpose of giving aid and support to the Communist Party at the time the petition was filed and the Board's determination was made. Yet the Board knew from the letter and opinion of the New York Supreme Court which were filed with it and from the uncontroverted representations of the Superintendent that, at all times from the filing of the petition to the date of the registration order, the I. W. O. had been operated under the supervision of the New York court and under the control of the Superintendent for the purpose of enforcing the insurance laws of New York. The theory of the Board that

individual I. W. O. lodges might be subversive although the national organization was untainted is entirely inconsistent with the theory of the petition and, at most, would authorize registration orders against individual lodges which were not prayed for in the petition. Moreover, the Board's theory was completely shattered by the uncontradicted representation of the Superintendent that all I. W. O. lodges had been dissolved as of December 15, 1953.

V.

The Petitioners were "parties aggrieved" by the order of the Board and have standing to petition this Court to review the order. The term "party" as used in section 14 of the Act, providing for review of Board orders by this Court, has the meaning given that term by section 2 of the Administrative Procedure Act. Since, as we have shown, Petitioners' were parties to the Board proceeding within the meaning of the Administrative Procedure Act and were aggrieved by the Board's order, they have standing under section 14 to petition for review by this Court. The jurisdiction of this Court is also supported by section 10 of the Administrative Procedure Act.

ARGUMENT.

I.

THE ACTION OF THE BOARD IN DENYING PETITIONERS' MOTIONS TO INTERVENE IN AND DEFEND THE PROCEEDING ON THEIR OWN BEHALF VIOLATED THE ADMINISTRATIVE PROCEDURE ACT AND THE ACT.

Section 16 of the Act makes the provisions of the Administrative Procedure Act (5 U. S. C. 1001-11) applicable to proceedings before the Board. The Administrative Procedure Act makes provision for intervention in proceedings before administrative agencies. Section 2(b) of that Act (5 U. S. C. 1001) defines the term "party" to include:

"... any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding."

Section 7(c) of the Administrative Procedure Act (5 U. S. C. 1006) defines the rights of "parties" to agency proceedings. It provides that:

"Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts."

The Board's denial of Petitioners' motions for leave to intervene and its entry of the default registration order deprived Petitioners of the hearing on the facts to which every "party" is entitled under section 7(c). Accordingly, the action of the Board violated the Administrative Procedure Act and the Act unless Petitioners were not "parties" to the proceeding within the meaning of section 2(b) of the former—*i.e.*, unless they were not "properly seeking and entitled as of right to be admitted" as parties.

Rule 24(a) of the Federal Rules of Civil Procedure states the conditions under which intervention is a matter of right in Federal Court proceedings. The rule provides:

"Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action . . . when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action. . . ."

The Board and the Attorney General both conceded that the criteria of Rule 24 are applicable to proceedings before the Board and that Petitioners would have been entitled to intervene if they had brought themselves within the rule. (J. A. 48-49; R. 253.) They did not deny, as was patently the case in the light of the I. W. O.'s failure to defend, that the interest of Petitioners was not represented in the proceeding.

The Attorney General opposed the officer-Petitioners' motion to intervene on the grounds (R. 251-54):

1. That he was not served with the motion.
2. That it did not appear that intervention was sought for the purpose of defending the action.
3. That intervention is not proper where one of the parties to the proceeding is in default since, in such case, intervention would amount to a substitution of parties.

The Attorney General's opposition to the member-Petitioners' motion to intervene was confined to the third ground stated above. (J. A. 57.)

All of the grounds of the Attorney General's opposition were plainly frivolous. The Attorney General had ample notice of the officer-Petitioners' motion. His counsel was present at the hearing of December 16, 1953 when the motion was filed and he argued in opposition to it at the hearing of January 4, 1954. (R. 251-54.) The motion itself stated that intervention was sought "in order fully to defend against the charges of the Attorney General" (J. A. 36), and counsel for the officer-Petitioners stated that, if intervention was granted, they would adopt the answer filed by the I. W. O. and defend on the basis of that answer. (R. 304.) The contention that intervention should be denied because of the failure of the I. W. O. to defend the proceeding is entirely groundless since it was precisely that failure that gave rise to the right of the Petitioners to intervene. Cf. *Price v. Gurney*, 324 U. S. 100, 105; *Wolpe v. Poretsky*, 144 F. 2d 505, 79 App. D. C. 141, cert. den. 323 U. S. 777; *Pellegrino v. Nesbitt*, 203 F. 2d 463.

Recognizing that there was no merit to the Attorney General's contentions, the Board rested its denial of intervention on entirely different grounds—primarily on the ground that neither the officer-Petitioners nor the member-Petitioners would be adversely affected or bound by a registration order against the I. W. O. (J. A. 49-50, 62.) This ruling is completely untenable as to both groups of Petitioners.

A. The Officer-Petitioners Were Entitled as of Right to Intervene In and Defend the Proceeding.

A final registration order against the I. W. O. would adversely affect and be binding upon the officer-Petitioners, first in their capacity as members and, second, as officers of the organization. An examination of the provisions of the Act and of the report of the Board establishes that the Board's rulings to the contrary were clearly erroneous.

1. THE BOARD ERRED IN RULING THAT A REGISTRATION ORDER AGAINST THE I. W. O. WOULD NOT ADVERSELY AFFECT AND BE BINDING UPON THE OFFICER-PETITIONERS, AS MEMBERS OF THE ORGANIZATION.

As we have seen, the entry of a final registration order against a "Communist-front" organization automatically results in the imposition of severe disabilities upon the members of the organization. Thus, a final registration order against the I. W. O. would make the officer-Petitioners, as members of the organization, ineligible to receive passports or to hold federal employment. (Secs. 5 and 6 of the Act.) Moreover, such an order would foreclose the officer-Petitioners from re-litigating the character of the I. W. O. in any prosecution for conduct which the Act makes criminal when engaged in by members of an organization ordered to register as a "Communist-front". Thus, for example, in a prosecution under sections 6 and 15 for the crime of making application for a passport with notice of the issuance of a final registration order against the I. W. O., the accused officer-Petitioner would be bound by the Board's finding that the I. W. O. was a Communist-front organization. He could not defend on the ground that the order was erroneous as a matter of law or contrary to the evidence. The only issue of fact open to him would be whether he had applied for the passport.¹⁵ In similar

¹⁵ He could not assert lack of notice of the order, since section 13(k) provides that publication in the Federal Register of the fact that an order has become final shall constitute notice of that fact to all members of the organization.

fashion, the officer-Petitioners would be bound by the order of the Board in any prosecution under sections 5 and 15 for holding federal employment or for failing to disclose the fact of membership in applying for such employment.

Accordingly, it would seem beyond dispute that the officer-Petitioners, as members, would be bound by a final registration order against the I. W. O. and, therefore, were entitled, as of right, to intervene in and defend the proceeding before the Board. There is no distinction in principle between the situation here presented and the familiar case where it is held that a corporate stockholder is entitled as of right to intervene in an action by or against the corporation upon a showing that the corporation is failing to assert a right or defense which it may have. *Price v. Gurney*, 324 U. S. 100, 105; *Kaufman v. Societe Internationale*, 343 U. S. 156. See also, *Wolpe v. Poretsky*, *supra*; *Pellegrino v. Nesbitt*, *supra*.

The Board, however, ruled otherwise. It rested its ruling on the assertion that the officer-Petitioners would not be harmed by a registration order because, "under existing Federal law and regulations," all of them were either already subject to the disabilities which the order would entail or were "in jeopardy" of those disabilities. It based this conclusion, in turn, on "official notice" that four of the officer-Petitioners (Greene, Saltzman, Shipka and Milgrom) were "active members of the Communist Party," and that the fifth (Kent) revealed in his writings "a very active sympathy with and support of Communist ideas and the U. S. S. R." (J. A. 49-50, 46-47.)

As we shall show, even if the factual premises for the Board's ruling were valid, its conclusion was completely unfounded as a matter of law. We shall further show that the factual premises on which the ruling rests were without foundation in the record, were not proper subjects of official notice, and were noticed by the Board in violation of the Administrative Procedure Act.

a. The Ruling of the Board Was Erroneous as a Matter of Law.

As we have seen, the Board denied intervention to four of the officer-Petitioners on the ground that "under existing Federal law and regulations, Federal employment and passport privileges are not available to them, since it is a matter of public record" that they were active members of the Communist Party. (J. A. 48.) Thus, the Board based its decision as to these officer-Petitioners on the proposition that they would not be harmed by a registration order for the reason that "existing Federal law and regulations" already subjected them, as Communists, to all of the harm that an order would inflict.

Assuming, *arguendo*, the validity of the Board's factual premise, this proposition is erroneous in two respects.

First, the Board's assertion is fallacious that "existing Federal law and regulations" impose upon Communist Party members all of the disabilities to which a registration order subjects the members of a "Communist-front" organization.

The Board does not identify the Federal laws and regulations to which it makes reference. However, apart from the Act, the only restrictions upon the eligibility of Communist Party members to hold Federal employment or passports are the following:

1. As to Federal employment: Executive order 10450 of April 29, 1953 (18 F. R. 2489); Department of Justice Regulation of April 29, 1953 (18 F. R. 2619).
2. As to passports: State Department Regulation of September 4, 1952 (22 C. F. R. 51.135).

A comparison of these sources with the provisions of the Act reveals that a final registration order against the I. W. O. as a "Communist-front" organization would impose more onerous sanctions and disabilities on members of the organization (including the four officer-Petitioners)

than those presently imposed on Communist Party members by existing executive orders and regulations.

As we have seen, section 5 of the Act makes members of an organization which has been ordered to register as a "Communist-front", unconditionally ineligible for Federal employment. On the other hand, Executive Order 10450 and the action of the Attorney General in listing the Communist Party as a subversive organization (5. C. F. R. Part 210, App. A) do not, *ipso facto*, bar Communist Party members from Federal employment. Under Executive Order 10450, Communist Party membership is simply one factor, among many, to be considered by the head of a department or agency in determining whether employment "is clearly consistent with the interests of the national security." (See secs. 2 and 8.) As the President and the Attorney General have stated, membership in an organization listed by the Attorney General "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case." 5 C. F. R. App. A, p. 200; cited by the Supreme Court in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 205.

The regulations of the State Department (22 C. F. R. 51.135) make members of the Communist Party ineligible for passports. However, there is a significant difference between these regulations and the provisions of section 6 of the Act which deny passports to members of organizations which have been finally ordered to register. Section 6 makes it a criminal offense for a member, having notice of the order, to apply for a passport, while the regulations impose no penalty for applications by Communist Party members. Thus, a Communist may test the validity of the regulations, without risk, by making application for a passport and seeking court review of its denial. A member of an organization ordered to register, however, cannot challenge section 6 of the Act without first applying for a passport and subjecting himself to prosecution and conviction if his challenge fails.

Accordingly, it is clear that, both as to Federal employment and passports, a final registration order against the I. W. O. would subject the four officer-Petitioners to sanctions and disabilities to which Communist Party members are not now subject. Thus, the Board was plainly in error in concluding that, because it found these officer-Petitioners to be Communists, they would not be harmed by a registration order and, therefore, were not entitled to intervene in and defend the proceeding.

Secondly, the four officer-Petitioners in question would suffer legal harm from a registration order, even if its consequences were identical with those to which they were already subject under existing law. The Board proceeded on the assumption that where an individual is subject to the sanctions of one law, he suffers no harm (in the legal sense) by having the same sanctions imposed upon him, under a second law. Hence, it concluded that the sanctions of the second law may be imposed without a hearing. However, the Board's assumption is patently untenable. For the individual suffers harm from each law, independently. This is apparent from the fact that the first law might be amended, repealed or invalidated, leaving the individual subject to the harm of the second law.¹⁶ Obviously, therefore, he is entitled to defend under the second law. By the Board's logic, a defendant could be given a life sentence for kidnapping, without a trial, on the ground that he was

¹⁶ This possibility, although always present, assumes added significance under the circumstances of this case. Existing restrictions on the eligibility of Communist Party members to secure Federal employment and passports are not imposed by statute but by executive order or departmental regulations which are readily amended. Moreover, the executive order and departmental regulations involved have been the subject of litigation in the Supreme Court and in this Court, some of it still pending, which leaves their validity in doubt. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123; *Joint Anti-Fascist Refugee Committee v. Brownell*, App. D. C., Nos. 11,591 and 12,269; *National Lawyers Guild v. Brownell*, App. D. C. No. 12,059; *Bauer v. Acheson*, 106 F. Supp. 445; *Robeson v. Acheson*, 198 F. 2d 985, — App. D. C. — .

already serving a similar sentence under a prior conviction for murder.

The Board adopted an even more attenuated variant of this absurd theory as the basis for denying intervention to the fifth officer-Petitioner, Kent. It could not take "official notice" that Kent was a Communist and hence had no conceivable basis for finding that he was already foreclosed from Federal employment and the enjoyment of passport privileges. Instead, it took "official notice" that Kent, although not a Communist, was "immersed in Communism" and therefore "in jeopardy," under existing law, of the sanctions he would suffer by virtue of a registration order. (J. A. 49-50.) The Report does not elucidate the term "in jeopardy." Apparently the Board meant that because of Kent's alleged "sympathy with and support of Communist ideas" (J. A. 47), he *might* be denied Federal employment and passports under existing loyalty procedures and passport regulations.¹⁷

Since the Board considered it possible that Kent might incur these sanctions independently of its action, it concluded that a hearing was unnecessary before it removed the uncertainty by imposing the sanctions upon him unconditionally. But, obviously, the fact that an individual may be denied government employment or a passport on valid grounds is no warrant for depriving him of both illegally. *Perkins v. Elg*, 307 U. S. 325; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 185.

Rule 24(a), as we have seen, makes intervention a matter of right where the applicant is not adequately represented and "is or may be bound by the judgment." The Board's rule, however, is that intervention should be denied where it appears possible that the applicant may suffer the injury which a registration order would inflict as a result of circumstances unrelated to the action of the

¹⁷ The Board took "official notice" that Kent had twice been denied passports by the State Department (J. A. 50) to support its theory of "jeopardy." However, the Board did not indicate the circumstances under which or the grounds on which the alleged denials of passports occurred.

Board. This is indeed a novel basis for dispensing with the necessity of a hearing. Its general application would yield startling results. Thus, it would justify the imposition of a death sentence without a trial on the grounds that the defendant had an advanced heart condition, was "in jeopardy" of death from natural causes, and therefore might not be hurt by hanging.

b. *The Factual Premises for the Board's Ruling Had No Foundation in the Record or in Official Notice.*

As we have seen, the Board based its ruling that the officer-Petitioners were not entitled to intervene in their capacity as members of the I. W. O. on the finding that four of the officer-Petitioners were "active members of the Communist Party" and that the fifth revealed in his writings "a very active sympathy with and support of Communist ideas and the U. S. S. R." (J. A. 49, 47.)

These findings were not and did not purport to be based on evidence. The Board stated that they were derived from "official notice" of the contents of an opinion of the Supreme Court of New York in the proceeding instituted by the Superintendent against the I. W. O. (J. A. 45.) It appears from this opinion (Application of Bohlinger, *In re* International Workers Order, Inc., 106 N. Y. S. 2d 953) that the officer-Petitioners were not parties to the proceeding and that the issue before the New York Court was whether the I. W. O. was (p. 981) "in such a condition that its further transaction of business will be hazardous to its policyholders, its creditors, and to the public."

Furthermore, the statement of the New York court with reference to the Communist Party membership and sympathies of the officer-Petitioners was not made a part of the record or even referred to in the proceeding before the Board. No request was made by the Attorney General that the Board take judicial notice of this statement and no suggestion was made by the Board of its intention to do

so. On the contrary, the first reference to the New York opinion occurred in the report of the Board.

Under all of these circumstances, it was obviously improper for the Board to take "official notice" of the alleged facts on which its decision was based.

In the first place, it is well settled that a court or administrative agency may, at most, take judicial or official notice of facts found by itself in another proceeding between the same parties. Thus, this Court has held that it would be improper for it or the District Court to take judicial notice of a decision of the District Court in a proceeding, to which appellant was not a party, that the appellee corporation was a charitable organization. *White v. Central Dispensary and Emergency Hospital*, 99 F. 2d 355, 358-59, 69 App. D. C. 122. The Court pointed out both that a trial court cannot properly take judicial notice of the records in other proceedings before it where the parties are different, and that, in proceedings between the same parties, a court of appeals cannot even take judicial notice of the records of subordinate courts within its own circuit.¹⁸ *A fortiori*, therefore, it was error for the Board to take official notice of the opinion of a New York court in a proceeding to which the officer-Petitioners were not parties.

In the second place, even if the contents of the New York opinion had been a proper subject for official notice, the procedure of the Board violated section 7(d) of the Administrative Procedure Act (5 U. S. C. 1006). That section provides:

"Where any agency decision rests on official notice of a material fact not appearing in the evidence in

¹⁸ Indeed, it is only under exceptional circumstances, and where the facts are "established and uncontroverted", that a court will take judicial notice of its own records in another proceeding between the same parties. *Paridy v. Caterpillar Tractor Co.*, 48 F. 2d 166; *Morse v. Lewis*, 54 F. 2d 1027, cert. den., 286 U. S. 557; *Fink v. Commissioner of Internal Revenue*, 163 F. 2d 796, 800-02.

the record, any party shall on timely request be afforded an opportunity to show the contrary."¹⁹

The Board, however, gave the officer-Petitioners no opportunity to show that the recitals of the New York opinion on which it relied were contrary to fact. For the officer-Petitioners had no notice of the Board's intention to take judicial notice of the opinion, but were confronted by a *fait accompli* in the report. This gross violation of the Administrative Procedure Act is, of course, not cured by the Board's fatuous statement that, "These facts as found by the New York Court have come to the attention of this Board in the official course of its duties regarding the subject proceeding." (J. A. 48, n. 2.) As this Court has said of reliance by an administrative agency on matters not introduced in evidence at the hearing, "Even the necessity of administrative efficiency cannot excuse the use of star chamber procedures to deprive a citizen of a fair hearing." *Sanders Bros. Radio Station v. F. C. C.*, 106 F. 2d 321, 326, 70 App. D. C. 297; rev'd on other grounds, 309 U. S. 470.²⁰

Thus, the decision of the Board denying the officer-Petitioners' motion for leave to intervene in their capacity as I. W. O. members was not only erroneous as a matter of law, but was based on gross procedural irregularities which deprived them of the rudiments of a fair hearing and decision on their motion. For both these reasons, the Board's order must be set aside.

¹⁹ This provision makes applicable to administrative agencies the judicial requirement that judicial notice must be requested, and notice of the request given the opposing party. See, *Wigmore on Evidence*, 3rd Ed., sec. 2568.

²⁰ For both of the reasons argued above, it was equally improper for the Board to take "official notice" that "it is a matter of record in the Department of State that [Kent] has twice been denied a passport by that that Department in recent years." (J. A. 50.) Furthermore, Kent's alleged failure to obtain a passport on these occasions was wholly irrelevant since it nowhere appears on what grounds a passport was denied him.

2. THE BOARD ERRED IN RULING THAT THE OFFICER-PETITIONERS WOULD NOT BE SUBJECT TO CRIMINAL PENALTIES, AS OFFICERS OF THE I. W. O., FOR FAILING TO REGISTER IT PURSUANT TO A REGISTRATION ORDER.

The Board's registration order is not only binding upon the officer-Petitioners in their capacity as members of the I. W. O. They are—or at all events may be—bound by it in their capacity as I. W. O. officers. For they may be subject to criminal prosecution for the failure of the I. W. O. to register in response to the order of the Board.

Section 7(h) of the Act provides that if an organization fails to register when ordered to do so, the duty to register it devolves upon the organization's executive officer and secretary (or the individuals performing the usual duties of these offices) and such other officers as the Attorney General may by regulation prescribe. The regulations of the Attorney General impose this duty upon all the principal officers of the organization and all of the members of its governing board. (28 C. F. R. 11.205.) A violation of section 7(h) is punishable by a fine not in excess of \$10,000 and imprisonment not in excess of five years *for each day that the failure to register continues.* (Sec. 15(a).)

Clearly, if the officer-Petitioners are or may be subject to these astronomical criminal penalties, they "are or may be bound" by the registration order within the meaning of Rule 24(a) and were entitled as of right to intervene and defend.

The Board disposed of this question with the statement that it could not "agree with applicants' counsel that, as former officers, applicants would, under the particular circumstances involved, be subject to criminal liability if the [I. W. O.] is ordered to register and fails to do so." (J. A. 49.)

The Board failed to state the grounds for its disagreement or the nature of the "particular circumstances" which it regarded as controlling. Apparently, it based its con-

clusion on the assumption that the officer-Petitioners were no longer officers of the I. W. O. but were "former officers," and as such had no duty under section 7(h). The Board's characterization of the officer-Petitioners as "former officers" rested exclusively upon a statement made by counsel for the Superintendent in the course of argument before the Board to the effect that when the Superintendent assumed sole control of the I. W. O. on December 15, 1953, he "discharged all officers." (J. A. 65.) However, the authority of the Superintendent to take this action and its legal effect, if any, are by no means clear. The Supreme Court of New York judge who presided over the liquidation proceeding stated in an opinion which was filed with the Board that the effect of the order vesting sole control in the Superintendent was that "the officers have all been ousted from any participation in the affairs" of the I. W. O. (J. A. 33.) This language plainly indicates that, although relieved of their duties, the officers retained title to their offices and were not merely "former officers." Whether their status under New York law remained such as to make them liable for failure to register the I. W. O. pursuant to section 7(h) is a question which, at least, is not free from doubt.

Moreover, the Board's action in issuing a registration order was based on the theory that the corporate entity of the I. W. O. continued in existence after the order vesting sole control in the Superintendent. (J. A. 43.) On that theory, the duty to register it must devolve on someone. But the report of the Board did not suggest upon whom, other than the officers, that duty rests.²¹

Finally, the Board's view that the officer-Petitioners are under no obligation to register the I. W. O. is not that of the Attorney General who, of course, is charged with the duty of prosecuting for non-registration. During the

²¹ The Superintendent, in argument, asserted that any suggestion that he was under a duty to register would be absurd. (R. 272.) The Board apparently acquiesced in this position, since its report contains no suggestion to the contrary. The fact is that the I. W. O. has not registered.

argument before the Board, counsel for the officer-Petitioners asked counsel for the Attorney General whether he was prepared to state that it was the position of the Department of Justice that the officer-Petitioners were under no duty to register the I. W. O. (R. 324.) Not only did this question remain unanswered, but counsel for the Attorney General indicated that he held a contrary view. For he stated that "the corporate entity of the [I. W. O.] still exists and most assuredly the corporate responsibility [sic] still has officials carrying out the duties of an executive officer or a secretary as defined by section 7(h)." (R. 243.)

In view of this position on the part of the Attorney General and of the doubtful legal questions involved, the officer-Petitioners can have no assurance of immunity from prosecution and conviction for a violation of section 7(h), following the entry of a final registration order. Since they may be subject to prosecution and conviction, it is obvious that they "may be bound" by the registration order within the meaning of Rule 24(a) and therefore were entitled, as of right, to intervene for that reason alone.

B. The Member-Petitioners Were Entitled as of Right to Intervene In and Defend the Proceeding.

The Board assigned the following grounds for its denial of the motion of the member-Petitioners to set aside the default registration order and for leave to intervene in and defend the proceeding (J. A. 61-62):

1. That "applicants' eligibility for federal employment and passports is highly questionable since they are members of an organization which the New York courts . . . have found to be Communist-controlled."

2. That the member-Petitioners made no showing that they had applied or intended to apply for federal employment or passports.

3. That "it is difficult to understand why applicants did not move to intervene at an earlier date."

4. That the member-Petitioners made no showing that they were in possession of evidence sufficient to prove the defense to the Attorney General's petition which they asserted.

We have already disposed of the first of these propositions in our discussion of the Board's denial of the officer-Petitioners' motion to intervene. For this proposition rests, first, on the Board's ridiculous theory (applied to the case of Kent) that intervention should be denied and the applicant deprived of a hearing wherever it appears that he *may* not be hurt by a registration order because of the *possibility* that he may suffer the same harm independently of the order. Furthermore, the Board's assertion that the I. W. O. was "Communist-controlled" (like its factual premises in the case of the officer-Petitioners) was based exclusively upon a statement of the New York court made in a proceeding to which the member-Petitioners were not parties and which had never been the subject of a request for official notice. The Board's ruling, therefore, was based on an alleged fact not in the record, not a proper subject for official notice, and noticed in violation of the Administrative Procedure Act.²²

The remaining three propositions on which the Board's decision rests are equally untenable.

1. THE MEMBER PETITIONERS WERE NOT REQUIRED TO SHOW THAT THEY INTENDED TO EXERCISE THE PRIVILEGES WHICH A REGISTRATION ORDER WOULD DENY THEM.

The member-Petitioners alleged that they were presently eligible for federal employment and passports and that since a registration order would conclusively bar them

²² In addition, the affidavits of the member-Petitioners, filed in support of their motions, stated that the I. W. O. was not Communist-controlled and offered to prove that fact if given an opportunity to do so. (J. A. 53-54.)

from both, they were entitled, as of right, to intervene in and defend the proceeding. (J. A. 54-56.) The Board, however, held that because the member-Petitioners did not allege that they had applied or intended to apply for federal employment or passports, their interest in the proceeding was only "contingent" and therefore insufficient to support their motion for leave to intervene. (J. A. 62.) Thus, the Board appears to hold that the right to intervene is limited to situations in which the applicant makes a showing that he will sustain irreparable injury as a consequence of an adverse judgment or order in the proceeding. This view is clearly erroneous.

The fallacy of the Board's position is demonstrated in the first place, by the explicit provisions of Rule 24(a). The rule does not require an applicant to show that he *will* be injured, irreparably or otherwise, by the judgment. On the contrary, it makes intervention a matter of right whenever it appears that the applicant "is or *may be* bound by a judgment" in the proceeding. (Emphasis supplied.) Thus, the rule makes the allowance of intervention mandatory even where the effect of the judgment upon the applicant depends—to use the Board's phrase—on a contingency. The criteria for intervention is: "is there a possibility that the applicant will be bound by the judgment?" 4 Moore's *Federal Practice* (2d ed.) 37. Accordingly, intervention is held to be a matter of right where the court believes that a judgment in the action may prejudice the applicant's rights, although it cannot say with certainty that such prejudice will result. See, *Champ v. Atkins*, 128 F. 2d 601, 76 App., D. C. 16; *Clark v. Sandusky*, 205 F. 2d 915, 919-20; *United States v. C. M. Lane Life-Boat Co., Inc.*, 25 F. Supp. 410.

Furthermore, the injurious effect of a registration order upon the member-Petitioners was not dependent on any contingency. For the order fixes their status unconditionally. It places them in a class of persons—members of "Communist-front" organizations—who may not lawfully

hold federal employment or apply for or hold passports.²³ Under the scheme of the Act, the registration order is a conclusive determination of that status which cannot be contested by the member-Petitioners in any other proceeding or before any other forum. The effect of the registration order is to classify the member-Petitioners as second class citizens, by denying them access to privileges available to other citizens. They cannot wait to challenge the propriety of this classification until such time as they may seek to exercise the privileges which the order denies them. For the order fixes their status irrevocably so that no subsequent challenge is possible. They therefore not only *may* but *will* be bound by the registration order. Accordingly, they had an interest in the proceeding of precisely the character which Rule 24(a) entitled them to protect by intervention.²⁴

Finally, the entry of the registration order against the I. W. O. resulted in an additional present injury to the member-Petitioners. For it branded them as members of a participant in the seditious and criminal international conspiracy described in section 2 of the Act and as disloyal persons who could not be entrusted with federal employment or permitted to leave the country. Such a finding of disloyalty is impermissible without according the accused an opportunity for a hearing. *Joint Anti-Fascist Refugee Committee v. McGrath, supra*. Since the member-Petitioners had no opportunity to contest this finding except by

²³ "To be deprived not only of present government employment *but of further opportunity for it* certainly is no small injury when government employment so dominates the field of opportunity." Jackson, J., concurring in *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 185. (Emphasis supplied.)

²⁴ Cf. *Wolpe v. Poretsky, supra*, at 507. There a property owner sought to intervene and defend the validity of a zoning order in a proceeding to set it aside. This Court held intervention to be a matter of right under Rule 24(a) since a judgment setting the zoning order aside would bar the applicant from relief when the injury to him matured upon the commencement of construction of a building which did not conform to the zoning order.

intervening in the proceeding before the Board, it was plainly error to deny them that right.

2. THE MOTION OF THE MEMBER-PETITIONERS WAS TIMELY FILED.

The Board seems to suggest, as a ground for denying the member-Petitioners' motion for leave to intervene, that their motion was not timely filed. The memorandum opinion states that the member-Petitioners had knowledge of the pendency of the New York liquidation proceeding against the I. W. O. and that since "the question of the [I. W. O.'s] representation before this Board was fully litigated in the New York courts in the aforesaid proceeding, it is difficult to understand why applicants did not move to intervene at an earlier date." (J. A. 61.)

The question is scarcely as difficult as the Board would like to make it. There was obviously no occasion and no basis for intervention by the member-Petitioners so long as it appeared that their interests in the proceeding would be represented by the I. W. O.—either through its officers or through the Superintendent. *Pelligrino v. Nesbitt, supra*; *Wolpe v. Poretsky, supra*. It was not until December 15, 1953 that the New York court denied the request of the officers of the I. W. O. for authority to defend the proceeding or until January 4, 1954 that the Superintendent flatly announced his decision not to oppose the Attorney General's motion for a default order. (J. A. 43.) Moreover, on the latter date, the Board reserved decision on the motion of the officer-Petitioners to intervene and defend on their own behalf and on behalf of all other members of the I. W. O. This motion was denied and the default order entered on January 14, 1954. (J. A. 51-52) The motion of the member-Petitioners was filed two weeks later, on February 1. (J. A. 58.) Affidavits submitted in support of this motion stated that it was not until January 18 and January 27 that the two member-Petitioners, respectively, learned of the refusal of the Superintendent to defend, or of the action of

the Board in denying intervention to the officer-Petitioners and in entering the default order. (J. A. 55, 56.)

Under these circumstances, the suggestion that the motion was not timely filed is frivolous.

3. THE MEMBER-PETITIONERS MADE A SUFFICIENT SHOWING THAT THEY HAD A MERITORIOUS DEFENSE TO THE PROCEEDING.

The affidavits submitted in support of the motion of the member-Petitioners stated that the I. W. O. was not a "Communist-front" organization, was not directed, dominated or controlled by the Communist Party, and was not operated for the purpose of giving aid or support to the Communist Party. They further stated that the I. W. O. was then under the exclusive direction, domination and control of the Superintendent and was being operated solely for the purpose of effectuating the policy of the insurance laws of New York, as construed and applied by the courts of New York. Finally, the affidavits stated that the member-Petitioners were prepared to present evidence to prove the foregoing facts. (J. A. 53-54.)²⁵ Obviously, if the facts asserted in the affidavits were proved, they would establish a complete defense to the Attorney General's petition. Obviously, too, in the absence of any denials by the Attorney General, the allegations contained in the affidavits should have been taken as true for the purpose of passing upon the motion to intervene. *Clark v. Sandusky*, 205 F. 2d 915, 918; *Otis Elevator Co. v. Standard Construction Co.*, 10 F. R. D. 404, 406.

The Board, however, held that the showing made by the member-Petitioners, although uncontradicted, was insufficient because they were "rank and file members resident in New York, with no showing that they possess information or knowledge as to the activities of the I. W. O. member-

²⁵ In their motion, the member-Petitioners offered to file "such further responsive pleading by movants, if any, as the Board may require or permit them to file herein." (J. A. 52.)

ship country-wide.” (J. A. 61.) Thus, the Board suggests that an applicant for intervention must not only assert a meritorious defense, but is required to reveal the sources and nature of his evidence and to satisfy the Board of his ability to prove the defense he asserts. Nothing could be more preposterous.²⁶

II.

THE BOARD ERRED IN RULING THAT PETITIONERS DID NOT HAVE STANDING TO INTERVENE IN AND DEFEND THE PROCEEDING ON BEHALF OF ALL OTHER MEMBERS OF THE I. W. O. AS A CLASS.

Both the officer-Petitioners and the member-Petitioners sought to intervene not only as individuals but also on behalf of all other members of the I. W. O. as a class. (J. A. 36, 52.) In support of their claim to class representation, both groups of Petitioners showed that the membership of the I. W. O. numbered approximately 100,000 persons residing in many states; that the membership included native born and naturalized citizens (some of whom were naturalized after January 1, 1951) and non-citizens; that some of the citizen members were federal employees, and that many of the members were eligible for federal employment and passports. (J. A. 53-54; R. 325-26.) They urged, therefore, that they had clearly made out a case for a class action under the well settled principles restated in Rule 23(a) of the Rules of Civil Procedure. (J. A. 55; R. 331.)

Rule 23(a) provides in part:

“Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is

²⁶ Moreover, “the activities of the I. W. O. membership country-wide” had no relevance whatsoever to the issue before the Board—i.e., whether the national organization was a “Communist-front” organization. (See, *infra*, p. 56.)

“(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; . . .

“(2) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.”

Both groups of Petitioners made out a case for true class intervention under clause (1) of the rule since they were seeking to enforce the primary right of the I. W. O. to defend the proceeding, the I. W. O. having refused to enforce it. See, *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 318; 3 Moore's *Federal Practice* (2d Ed.) 3436; Glenn, *The Stockholders' Suit*, 33 Yale L. J. 580-82. In addition, they alleged grounds for so-called “spurious” class intervention under clause (3) of the rule since all the members had several rights which would be invaded by a registration order, and which were affected by the common questions of law and fact involved in a defense to the Attorney General's petition. *Brown v. Board of Education*, — U. S. — (May 17, 1954); *Redmond v. Commerce Trust Co.*, 144 F. 2d 140, 151-52; *Wilson v. Board of Supervisors*, 92 F. Supp. 986, 340 U. S. 909; *Lopez v. Seccombe*, 71 F. Supp. 769; *Johnson v. Board of Trustees*, 83 F. Supp. 707; *McDaniel v. Board of Public Instruction*, 39 F. Supp. 638; *Parker v. Lester*, 112 F. Supp. 433.

The Board's disposition of the class aspect of Petitioners' motions to intervene rested on grounds never suggested by the Attorney General who at no time questioned Petitioners' standing to represent the class. An examination of the reasons assigned by the Board for its action shows that it was clearly erroneous.

A. As to the Officer-Petitioners.

The Board based its decision that the officer-Petitioners did not and could not represent the other members of the I. W. O. in the proceeding on the following grounds (J. A. 48.):

1. That it did not appear that there was "a 'class' susceptible of such representation."
2. That the officer-Petitioners "have interests foreign to, and, indeed, conflicting with those of the rank and file members."
3. That it did not appear that the other members had notice of the proposed intervention or that "they desire or acquiesce in such representation."
4. That the Superintendent "represents to this Board that applicants have no authority to represent the other members."

1. The Board failed to indicate why it was not satisfied that the members of the I. W. O. constituted a class "susceptible of representation." It is plain, however, that they are such a class within the precise meaning of clauses (1) and (3) of Rule 23 and the authorities cited above.

2. The Board's conclusion that the interests of the officer-Petitioners were in conflict with those of the rank and file members was based on "official notice" of the statements contained in the opinion of the Supreme Court of New York that four of the officer-Petitioners were active members of the Communist Party and that the fifth was sympathetic to the Communist viewpoint. (J. A. 49-50.) As we have shown, however, this factual premise is invalid, since the New York opinion was not a proper subject for official notice and, in any case, was noticed in violation of the Administrative Procedure Act. (*Supra*, p. 36.)

Furthermore, the only conflict of interest that concerned the Board was an antagonism as to the subject matter of the proceeding. *Redmond v. Commerce Trust Co.*, *supra*, at 151. It is obvious that, whatever their ideological differences, the interests of the officer-Petitioners and the other members in the subject matter of the proceeding before the Board were identical—i.e., avoidance of the penalties and disabilities consequent to both upon a registration

order. It is indeed a novel suggestion that the fact—if established—that the officer-Petitioners and the rank and file members held conflicting political views would bar the former from representing the latter in the proceeding before the Board. By that logic, Republican stockholders could not maintain a derivative class action on behalf of those of their fellow stockholders who happened to be Democrats.

3. It is true, as the Board stated, that the officer-Petitioners did not notify the other members of their proposed intervention. But Rule 23 makes no such requirement. It requires only that the members of the class ("one or more") who join in the action "will fairly insure the adequate representation of all." As we have seen, however, the only reason given by the Board for holding that the officer-Petitioners did not adequately represent the other member was unfounded in fact and absurd in law.

Furthermore, it is obvious that under the circumstances of this case, it would have been impossible for the officer-Petitioners to have notified the other members of their intention to seek intervention. The occasion for intervention did not arise until December 15, 1953, when the New York Court refused to authorize the I. W. O. to defend the proceeding (J. A. 36.) The motion to intervene had to be filed on December 16 to prevent the Board from entering a default order on that day, as it had announced it would. (J. A. 41.) If the Board had entertained any legitimate doubt as to the adequacy of the officer-Petitioners' representation of the other members, it should have held a hearing on that question of fact, *Underwood v. Maloney*, 14 F. R. D. 222, 27, and could have made provision for notice to the members in its order setting the hearing.

Finally, the purpose of the requirement of Rule 23 that adequate representation of the class must be fairly insured is to satisfy due process requirements by protecting the interests of the absent members in a judgment which will be *res adjudicata* as to them. 3 Moore's *Federal Practice*

(2nd Ed.) 3436. In the present case, however, acting on the pretext that the members were not notified or adequately represented, the Board proceeded to enter a default registration order which was binding upon and *res adjudicata* against the entire class, while denying them any representation whatsoever. Thus the Board accomplished precisely what the rule was designed to prevent—the rendition of a judgment against a class in the absence of any representation by the class.

4. The Board does not find that the officer-Petitioners had no authority to intervene in and defend the proceeding on behalf of the other members as a class, but only that the Superintendent made a representation to that effect. (J. A. 48.) Obviously, it would be improper for the Board to rely on a representation made to it unless it satisfied itself that the representation was well founded. In fact, however, the Superintendent intended to make no such representation, as clearly appears from the following colloquy (R. 306-07):

“Mr. Williams . . . I said merely on behalf of the State of New York, said that no one had the right to appear *for the corporation* except the Attorney General speaking for the Superintendent of Insurance. . . .

“Mr. Abt. You are not contending that Judge Greenberg’s order enjoins an individual member from making application to appear on his own behalf in this proceeding?

“Mr. Williams. I don’t think that any individual has any right to speak *for the organization*, but I don’t think that Judge Greenberg’s order enjoins any individual from appearing in this proceeding or any other proceeding and defending on his own behalf. . . .”
(Emphasis supplied.)

Obviously if, as the Superintendent conceded, each member of the I. W. O. had authority under the order of the New York Court to intervene and defend on his own behalf, one or more were authorized to intervene and defend on behalf of the class. It is apparent from the Superin-

tendent's statement that the sole effect to the order of the New York Court, as in the case of any receivership, was to enjoin anyone other than the Superintendent from acting on behalf of the corporation and had nothing whatsoever to do with class actions by individual members.

B. As to the Member-Petitioners.

The Board held that the member-Petitioners could not intervene on behalf of the class on the following grounds (J. A. 61-62):

1. They did not show that there was "a class susceptible of such representation."
2. They did not show that they would "sufficiently represent the other I. W. O. members as a class."
3. "The protection of the interests of the rank and file of the I. W. O. was one of the primary objectives of the New York State proceedings and these members are now only competently represented by the Superintendent of Insurance."

The reasons for these conclusions are not elucidated by the Board. We have dealt with the Board's first two grounds in our discussion of the motion of the officer-Petitioners and shown that they were wholly erroneous.

The Board's statement that the members of the I. W. O. "are now only competently represented by the Superintendent of Insurance" is likewise completely unfounded. Whatever the purpose of the New York State proceeding may have been, it obviously was not to protect the interests of I. W. O. members in the action before the Board. On the contrary, it appears from the Board's own report that the Superintendent advised the Board that he refused to defend or otherwise participate in that action on behalf of the I. W. O., its members or anybody else. (J. A. 42-43.) Moreover, as we have seen (*supra*, p. 51), the Superin-

tendent never asserted that he was "competent" to represent the members before the Board. On the contrary, he advised the Board that there was nothing in any order of the New York Court to prevent the individual members from intervening and defending their interests in the proceeding.

It is plain, therefore, that the Board erred in holding that neither group of Petitioners was entitled to intervene on behalf of the I. W. O. members as a class. The officer-Petitioners and the member-Petitioners were each clearly entitled to defend the proceeding both on their own behalf and on behalf of the class that they sought to represent.

III.

THE ORDER OF THE BOARD VIOLATED THE FIFTH AMEDMENT BY SUBJECTING THE PETITIONERS AND ALL OTHER MEMBERS OF THE I. W. O. TO SANCTIONS AND DISABILITIES WITHOUT A HEARING.

As we have seen, the order of the Board, if it becomes final, will result in the imposition of severe sanctions and disabilities upon the Petitioners and all the other members of the I. W. O., whom Petitioners sought to represent as a class. They will be barred from federal employment. Citizen members will be denied the right to travel abroad. Naturalized members will be subject to loss of citizenship. Non-citizen members will be barred from naturalization and become subject to deportation. The officer-Petitioners, as officers, will be exposed to criminal prosecution for failure to register the I. W. O. All of the members will be invidiously identified as members of an organization which is a participant in the seditious conspiracy described in section 2.

The rights and privileges of which the Petitioners and the other members of the I. W. O. will be deprived clearly constitute "liberty and property" protected by the due process clause of the Fifth Amendment. The due process clause protects "the right of the citizen to be free in the enjoyment of all his faculties," and to "earn his livelihood

by any lawful calling.” *Allgeyer v. Louisiana*, 165 U. S. 578, 589. See also *Williams v. Fears*, 179 U. S. 270, 274; *Truax v. Raich*, 239 U. S. 33, 41. It has been applied to governmental action barring persons from public employment and other vocations,²⁷ depriving both citizens and aliens of the right to leave the country,²⁸ and deporting a resident alien.²⁹ The interest in reputation is also protected by due process.³⁰

Since the order of the Board entails consequences which deprive I. W. O. members of liberty and property, due process required a hearing as a condition to the entry of the order. *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*; *Morgan v. United States*, 304 U. S. 1, 14-15. Nevertheless, the action of the Board in denying the Petitioners’ motions to intervene, in entering a registration order by default, and in thereafter refusing to vacate that order resulted in depriving Petitioners and the other members of the I. W. O. whom they sought to represent of liberty and property without a hearing. The order of the Board bars the members of the I. W. O. from access to valuable rights and privileges and exposes the officer-Petitioners to criminal prosecution, all consequent on the Board’s determination that the I. W. O. is a “Communist-front” organization. As we have seen (*supra*, p. 30) the determination is final and binding upon the Petitioners and other members. Yet, this determination was made *ex parte* in the face of Petitioners’ timely demand for a hearing in which they could contest its validity. There could be no

²⁷ *Wieman v. Updegraff*, 344 U. S. 183; *Adler v. Board of Education*, 342 U. S. 485; *Re Carter*, 177 F. 2d 75, 85 App. D. C. 229; *Norris & Hirschberg v. S. E. C.*, 163 F. 2d 689, 82 App. D. C. 32.

²⁸ At least as to the procedural due process requirement of a hearing. *Han-Lee Mao v. Brownell*, 207 F. 2d 142, App. D. C. ; *Bauer v. Acheson*, 106 F. Supp. 445. Cf. *Galvan v. Press*, U. S. (May 24, 1954).

²⁹ *Japanese Immigrant Case*, 189 U. S. 86; *Sung v. McGrath*, 339 U. S. 33.

³⁰ *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*.

more flagrant denial of the elementary requirements of due process.³¹

IV.

THE ORDER OF THE BOARD WAS NOT AUTHORIZED BY SECTION 13(D) (2) OF THE ACT, PROVIDING FOR DEFAULT ORDERS.

The Board stated that, in issuing its order directing the I. W. O. to register as a "Communist-front" organization, it was acting pursuant to section 13(d) (2) of the Act. (J. A. 51.) That section provides that where an organization declines or fails to appear at a hearing accorded to it, "the Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization . . . to register." It is plain, however, that this section did not authorize the Board to enter a default order against the I. W. O. in the circumstances of this case.

A. Section 13(d) (2) Does Not Authorize the Issuance of a Default Order in Violation of the Administrative Procedure Act and Due Process.

We have shown that the action of the Board in denying the Petitioners' motions to intervene in and defend the proceeding violated the Administrative Procedure Act and deprived Petitioners and the other members of the I. W. O. whom they sought to represent of due process of law. It is clear that section 13(d) (2) does not apply in this situation. It was obviously not intended to and could not

³¹ In the present posture of this case, we do not reach the question whether the due process rights of the Petitioners and the other members of the I. W. O. would have been satisfied if the I. W. O. had defended the proceeding or if Petitioners had been permitted to do so. That question goes to the constitutionality of the Act which imposes sanctions and disabilities on the members of an organization solely by virtue of their membership, without regard to personal innocence or lack of knowledge of the alleged character of the organization, and without affording them an opportunity to demonstrate that they are fit persons to enjoy the privileges which a registration order denies them. Cf., *Wieman v. Updegraff* and *Adler v. Board of Education*, both *supra*; *Schneiderman v. United States*, 320 U. S. 118, 136; *De Jonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242. Cf. *Galvan v. Press*, *supra*.

authorize the Board to enter a default order in violation of the Fifth Amendment and of the Administrative Procedure Act which section 16 of the Act specifically makes applicable to proceedings before the Board.

B. Section 13(d) (2) Does Not Authorize a Default Order Where, as in This Case, the Material Allegations of the Petition Are Known by the Board to Be False.

The issue before the Board was whether or not the I. W. O., *currently*, was a "Communist-front" organization. This is clear from sections 13(g) and (h) which provide that the Board shall find whether an accused organization "is" or "is not" a "Communist-front" organization—*i.e.*, whether it is or is not such an organization at the time the determination is made.

Accordingly, the Attorney General was required to and did allege in his first amended petition that "the I. W. O. has been *and is* substantially directed, dominated and controlled by the Communist Party and has been *and is* primarily operated for the purpose of giving aid and support to the Communist Party." (J. A. 13, emphasis supplied.)

The Board, however, knew when it entered its order that this allegation as to the current character of the I. W. O. was completely unfounded and false. It knew that at the time the amended petition was filed, and for two and one-half years prior to that date, the I. W. O. had not been directed, dominated or controlled by the Communist Party. It knew, on the contrary, that from December 15, 1950 to the date of its order, the I. W. O. had been under the supervision of the Supreme Court of New York; that until December 15, 1953 the organization had been under the joint management of the Superintendent and its officers, and that after December 15, 1953 it had been under the sole management and control of the Superintendent. The Board also knew that throughout this entire period the I. W. O. had not been operated for the purpose of giving aid or support to the Communist Party, but for the purpose of effectuating the policy of the insurance laws of New York as construed

and applied by the courts of that state.³² It knew these facts from the contents of the letter and opinion of Justice Greenberg and from the uncontroverted representations made to it by the Superintendent.

Thus, at the time the Board entered its order, it knew that the allegations on which the Attorney General based his prayer for relief were contrary to fact. As New York Supreme Court Justice Greenberg stated in his opinion (J. A. 34):

“The Superintendent’s representative pointed out to this court, as well as to the Subversive Activities Control Board, that since the law requires that preliminary to action by the Board it be established that the Respondent was Communist-dominated and controlled down to the date of the hearing, that the result of the hearings would be to stigmatize the Superintendent of Insurance of the State of New York in the light of the fact that he was in virtually sole control of the organization. Such an argument appealed to the court but apparently fell on deaf ears with the Subversive Activities Control Board.”

In the report which accompanied its registration order, the Board attempted to rationalize its action by stating (J. A. 50):

“Concerning Mr. Abt’s contention that under the facts of this case the Board cannot find that the allegations of the petition are true, it does not appear of record that this is the case. This is borne out by Mr. Williams’ representations that neither the Superintendent of Insurance nor his representatives have attempted to police or supervise the meetings of some seventeen hundred lodges of [the I. W. O.] throughout the country; and that there was no method by which any subversive activity could have been detected or punished, or brought to the Court’s attention. On this

³² The petition and amended petition which alleged that the I. W. O. “is” a “Communist-front” organization did not so much as mention the New York proceeding or the appointment of the Superintendent as joint manager of the I. W. O.

state of the record we are not required to speculate as to whether the allegations of the petition are provable. The Attorney General has stood ready to submit evidence in support of those allegations."

The Board's attempt to explain its action serves only to emphasize its error.

In the first place, the Board's theory that individual I. W. O. lodges might be "subversive" although the national organization was untainted is entirely inconsistent with the theory of the petition and the amended petition. The amended petition (J. A. 11) was directed against the I. W. O. as a national organization. It sought an order requiring the national organization to register. None of its allegations referred to the activities of individual lodges. On the contrary, the amended petition specifically alleged (J. A. 12):

"This organization [the I. W. O.] has been and is composed of large numbers of members and affiliates who function through nationality sections, state, county, city, lodges and other units, *which are subject to the supervision and control of the national office of the I. W. O.*" (Emphasis added.)

Thus the Board's theory that the lodges may be "subversive" despite the Superintendent's management of the national office flatly contradicts the allegation of the petition that the lodges are supervised and controlled by the national office.

In the second place, the Board's theory could not support the entry of a registration order against the national I. W. O. organization, which it conceded was not currently under Communist domination and control. At most, it would authorize registration orders (not prayed for in the petition) against individual lodges, upon proof that they satisfied the definition of a "Communist-front" organization.

Finally, the Board's theory was completely shattered by the statement of the Superintendent (which the Board con-

veniently ignored) that all of the I. W. O. lodges were dissolved by order of the New York court and the Superintendent as of December 15, 1953. (R. 272, 277.) As counsel for the Superintendent advised the Board (R. 272):

"All the lodges have been dissolved. They cannot hold any meetings. If they do, they hold meetings not as I. W. O. lodges but as individuals."

Thus, the Board supported its order on the theory that lodges may have been engaged in "subversive" activity when, in fact, it knew from the undisputed representation of the Superintendent that the lodges in question were non-existent.

It is clear, therefore, that the uncontradicted evidence before the Board established, contrary to the allegations of the Attorney General's petition, that the I. W. O. was not and could not conceivably have been a "Communist-front" organization at the time the petition was filed and the order was entered. Obviously, section 13(d) (2) does not authorize the Board to treat the petition as confessed and enter a default order thereon where it appears that the material allegations upon which the right to relief rests are false. No determination by an agency of government can be sustained when, as here, it is "an arbitrary fiat contrary to the known facts." *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, at 136.

V.

SINCE THE PETITIONERS ARE "PARTIES AGGRIEVED" BY THE ORDER OF THE BOARD, THEY HAVE STANDING TO PETITION THIS COURT TO REVIEW THE ORDER.

At the pre-hearing conference, counsel for the Respondent indicated that he intended to argue that the Court does not have jurisdiction of this proceeding because the Petitioners are not parties aggrieved by the order of the Board within the meaning of section 14 of the Act, and hence that the review procedure provided by that section is not available to them. It is clear, however, that the same consider-

ations which establish the Petitioners' right to intervene as parties to the proceeding before the Board likewise establish their standing to prosecute a petition for review by this Court pursuant to section 14.

Section 14 provides that, "The party aggrieved by any order entered by the Board under subsection (g) . . . of section 13 may obtain a review of such order" by this Court upon a petition praying that such order be set aside. It is clear that the term "party" as used in section 14 has the meaning given to that term in the Administrative Procedure Act, since section 16 makes the provisions of that act applicable to the conduct of proceedings by the Board.

As we have seen, section 2 of the Administrative Procedure Act defines "party" to include any person "properly seeking and entitled as of right to be admitted as a party, in any agency proceeding". We have shown that the Petitioners were clearly "parties" to the proceeding before the Board within the meaning of this section and that they were "aggrieved" by the Board's order. It follows that they are likewise "parties aggrieved" within the meaning of section 14 and, hence, that this Court has jurisdiction of their petition for review. This conclusion is also required by section 10 of the Administrative Procedure Act which provides that "any person suffering legal wrong because of any agency action" shall be entitled to avail himself of "any special statutory review procedure relevant to the subject matter."³³

³³ Respondent does not appear to contend that this Court lacks jurisdiction because section 14 is confined to review of orders entered by the Board under section 13(g) while, in this case, the Board purported to issue its order under section 13(d)(2). In any event, such a contention is without merit. As we have shown, the order was not authorized by section 13(d)(2), and it is obvious that the Board cannot oust this Court of jurisdiction by mislabelling its order. *Cf. Philadelphia Co. v. Securities and Exchange Commission*, 164 F. 2d 889, 899; 82 App. D. C. 335, cert. den. 333 U. S. 828.

CONCLUSION.

We have shown that the Board erred in denying Petitioners' motions for leave to intervene and in entering (and thereafter refusing to vacate) a default registration order against the I. W. O. At a minimum, therefore, the order of the Board must be set aside and the proceeding remanded with directions to grant Petitioners' motions and proceed to a hearing on the facts.

We have shown further, however, that the uncontroverted facts which were submitted to and accepted by the Board conclusively established that the material allegations of the Attorney General's petition were false, and that the I. W. O. was not a "Communist-front" organization at the time the petition was filed and the order entered, and is not such an organization at the present time. Under these circumstances, we submit, no purpose can be served by any further hearing before the Board. The order of the Board should therefore be set aside without remanding the proceeding.

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SUPPLEMENT.**Statutes Involved.****A. Internal Security Act.**

The pertinent provisions of the Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., are as follows:

TITLE I—SUBVERSIVE ACTIVITIES CONTROL

* * * * *

NECESSITY FOR LEGISLATION

SEC. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

* * * * *

DEFINITIONS

SEC. 3. For the purposes of this title—

(1) The term “person” means an individual or an organization.

(2) The term “organization” means an organization, corporation, company, partnership, association, trust, foundation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term “Communist-action organization” means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.

(4) The term “Communist-front organization” means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

(5) The term “Communist organization” means a Communist-action organization or a Communist-front organization.

* * * *

(11) The term "Board" means the Subversive Activities Control Board created by section 12 of this title.

(12) The term "final order of the Board" means an order issued by the Board under section 13 of this title, which has become final as provided in section 14 of this title.

* * * *

EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

Sec. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such other has become final—

(A) in seeking, accepting, or holding any non-elective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

* * * *

(c) As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9 (b) of this title.

DENIAL OF PASSPORTS TO MEMBERS OF COMMUNIST ORGANIZATIONS

Sec. 6. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

* * * *

(c) As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9 (b) of this title.

REGISTRATION AND ANNUAL REPORTS OF COMMUNIST ORGANIZATIONS

Sec. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f) (1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

(2) It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organization and of persons who actively participate in the activities of such organization.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as an officer or member of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practicable time after the filing of such registration statement or annual

report. Upon written request of any individual so notified who denies that he holds any office or membership (as the case may be) in such organization, the Attorney General shall forthwith initiate and conclude at the earliest practicable time an appropriate investigation to determine the truth or falsity of such denial, and, if the Attorney General shall be satisfied that such denial is correct, he shall thereupon strike from such registration statement or annual report the name of such individual. If the Attorney General shall decline or fail to strike the name of such individual from such registration statement or annual report within five months after receipt of such written request, such individual may file with the Board a petition for relief pursuant to section 13 (b) of this title.

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

* * * *

KEEPING OF REGISTERS; PUBLIC INSPECTION;
REPORTS TO PRESIDENT AND CONGRESS

SEC. 9. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

(1) a "Register of Communist-Action Organizations", which shall include (A) the names and addresses of all Communist-action organizations registered under section 7, (B) the registration statements and annual reports filed by such organizations thereunder, and (C) the registration statements filed by individuals under section 8; and

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection: *Provided*, That the Attorney General shall not make public the name of any individual listed in either such register as an officer or member of any Communist organization until sixty days shall have elapsed after the transmittal of the notification required by section 7 (g) to be sent to such individual, and if prior to the end of such period such individual shall make written request to the Attorney General for the removal of his name from any such list, the Attorney General shall not make public the name of such individual until six months shall have elapsed after receipt of such request by the Attorney General, or until thirty days shall have elapsed after the Attorney General shall have denied such request and shall have transmitted to such individual notice of such denial, whichever is earlier.

* * * *

(d) Upon the registration of each Communist organization under the provisions of this title, the Attorney General shall publish in the Federal Register the fact that such organization has registered as a Communist-action organization, or as a Communist-front organization, as the case may be, and the publication thereof shall constitute notice to all members of such organization that such organization has so registered.

USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

SEC. 10. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed

by the Attorney General, with the name of the organization appearing in lieu of the blank: "Disseminated by _____, a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place the blank: "The following program is sponsored by _____, a Communist organization".

* * *

SUBVERSIVE ACTIVITIES CONTROL BOARD

SEC. 12. (a) There is hereby established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three members of the Board shall be members of the same political party. Two of the original members shall be appointed for a term of one year, two for a term of two years, and one for a term of three years, but their successors shall be appointed for terms of three years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

* * *

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 13 (a) of this title, or by any organization under section 13 (b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 3 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 3 of this title;

* * *

PROCEEDINGS BEFORE BOARD

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

* * *

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiners designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpoena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry.

* * *

(d) (1) All hearings conducted under this section shall be public. Each party to such proceeding shall have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty

of misbehavior which obstructs the hearing such party or counsel may be excluded from further participation in the hearing.

* * *

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2;

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title;

* * *

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such organization to register as such under section 7 of this title; and send a copy of such order to such organization;

* * *

(k) When any order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14 (b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

JUDICIAL REVIEW

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsection (g), (h), (i), or (j) of section 13 may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The

Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. * * * The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in title 28, United States Code, section 1254.

(b) Any order of the Board issued under section 13 shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals; or

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than \$10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register

under section 8, shall, upon conviction of failure to so register to file any such registration statement or annual report, be punished for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

* * *

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000. Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

SEC. 16. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.

* * *

B. Immigration and Nationality Act

Pertinent provisions of sections 22 and 25 of the Act have been carried forward in the Immigration and Nationality Act, 66 Stat. 163, adopted June 27, 1952, 8 U. S. C. secs. 1182, 1251, 1424, 1451, as follows:

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * *

(E) Aliens not within any of the other provisions, of this paragraph, who are members of or affiliated

with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 241. (a) Any alien in the United States (including any alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 313. (a) Notwithstanding the provisions of section 405 (b), no person shall hereafter be naturalized as a citizen of the United States—

* * *

(2) . . . (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 7 of the Subversive Activities Control Act of 1950; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization

during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization.

SEC. 340. * * * (c) If a person who shall have been naturalized after the effective date of this Act¹ shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

C. The Administrative Procedure Act

Pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 8 U.S.C. 1001 ff., are as follows:

SEC. 2. * * *

(b) * * * "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed

¹ The introductory clause of section 25 (d) of the Act reads "If a person who shall have been naturalized after January 1, 1951 . . ."

to prevent an agency from admitting any person or agency as a party for limited purposes.

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) The form of proceeding by judicial review shall be by any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * *



No. 12135

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVE GREENE, RUBIN SALTZMAN, ROCKWELL KENT, PETER
SHIPKA, SAM MILGROM, PAULINE OSSIP and ZEBEDEE COL-
INS, PETITIONERS

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, RESPONDENT

ON REVIEW OF ORDER OF THE SUBVERSIVE ACTIVITIES
CONTROL BOARD

BRIEF FOR RESPONDENT

WILLIAM F. TOMPKINS,
*Assistant Attorney General,
Department of Justice.*

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United States Court of Appeals
For the
District of Columbia Circuit

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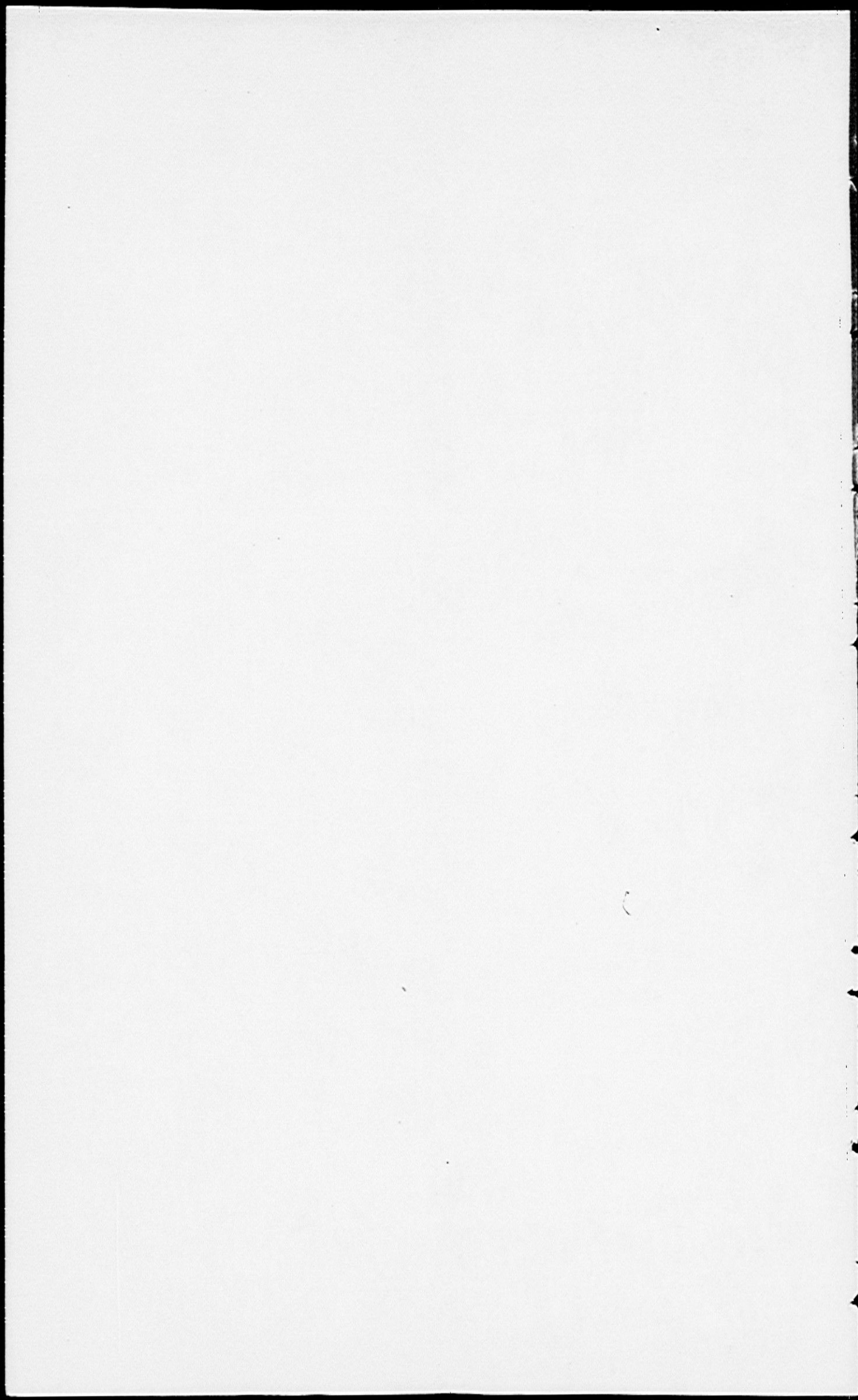
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CLERK

QUESTIONS PRESENTED

1. Whether this Court possesses jurisdiction to review a default order pursuant to section 13(d)(2) of the Internal Security Act of 1950, requiring the International Workers Order, Inc., to register as a Communist-front organization in the absence of statutory authority.

2. Whether the Board correctly refused to permit Petitioners to intervene and assert a claimed derivative right to defend the IWO when the receivership court had upheld the refusal of the receiver of this organization to allow Petitioners to defend it.

3. Whether the question of Intervention in a proceeding before the Board is a matter for the Board's discretion and whether such discretion was exercised in a reasonable manner.



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United States Court of Appeals

FOR THE DISTRICT COURT OF COLUMBIA CIRCUIT

No. 12135

DAVE GREENE, RUBIN SALTZMAN, ROCKWELL KENT, PETER
SHIPKA, SAM MILGROM, PAULINE OSSIP and ZEBEDEE COL-
LINS, PETITIONERS

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, RESPONDENT

*ON REVIEW OF ORDER OF THE SUBVERSIVE ACTIVITIES
CONTROL BOARD*

BRIEF FOR RESPONDENT

JURISDICTIONAL STATEMENT

This appeal seeks review of an order of the Subversive Activities Control Board (herein called Board) (J. A. 51-52)¹ requiring the International Workers Order, Inc. (herein called IWO) to register as a Communist-front

¹ We have throughout this brief referred to the pagination of the Joint Appendix with the symbol "J.A.", and in those few instances where reference is made to the original transcript of the record as filed in the Court we have employed the symbol "R". The pagination of Petitioners' brief will be referred to by the symbol "Pets. br.". The Appendix to Respondent's brief will be referred to by the symbol "App.".

organization pursuant to Section 7 of the Internal Security Act of 1950, 64 Stat. 993, 50 U.S.C. 786.

The jurisdiction of the Board was invoked under Section 13 of the Act, 64 Stat. 998, 50 U.S.C. 792, when the Attorney General of the United States filed a petition thereunder to require the IWO to register as a Communist-front organization as defined in Section 3(4) of the Act.

The jurisdiction of this Court was invoked by Petitioners under Section 14 of the Act, 64 Stat. 1001, 50 U.S.C. 793, by the filing of a joint and several petition to review and set aside the order of the Board (J.A. 2-9).

COUNTERSTATEMENT OF THE CASE
PRELIMINARY STATEMENT OF THE ISSUE

The Petitioners, Dave Greene, Rubin Saltzman, Peter Shipka, Samson Milgrom and Rockwell Kent (herein called former officers) are deposed officers (J.A. 33, 41, 48, 49, 63, 65, 66, 67, 68, 69 70) and former members of the IWO.²

The Petitioners, Ossip and Collins (herein called former members) are former members of the IWO.³

Each group of Petitioners separately sought to intervene in and defend the IWO⁴ in the proceeding before the

² On January 20, 1954, the New York State Superintendent of Insurance notified all certificate holders that by reason of judicial action they were no longer members of the IWO and that continuing to pay premiums did not constitute membership in a Communist-front organization, App. 85-6. In spite of this representation of the Superintendent, whose word in other respects Petitioners have treated as conclusive (Pets. br. 27, 51-52, 58-59) the former members in their affidavits in support of their motion to intervene, dated seven days after the notification (J. A. 53-57) represented that they were still members of the IWO. Furthermore, Petitioners' entire brief is predicated on the assumption that Petitioners continue to remain members of the IWO.

³ See footnote 2, supra.

⁴ Although Petitioners consistently refer to themselves as having attempted to intervene and defend "the proceeding", (Pets. br. 2, 3, 22, 24, 25, 27, 34, 41, 43, 51) (J. A. 3, 5, 52) they, of course, were actually and legally seeking to intervene and defend the IWO since their asserted right is admittedly derived from the corporation (Pets. br. 48, 50) (R. 313-314, 333-334) in which case "* * * it is well settled that * * * such a suit is still a suit to enforce the right

Board on their own behalf and on behalf of all other former members of the IWO (J.A. 36, 52-53). At the time that intervention was sought, the IWO was under the sole management and control of the Superintendent of Insurance of the State of New York and the Supreme Court of the State of New York. (R. 138) (J.A. 41-43). The Superintendent of Insurance of the State of New York refused to represent the IWO before the Board for the reason that it was a Communist organization (J.A. 42-3), and the Supreme Court of the State of New York likewise refused to permit the expenditure of assets of this liquidating corporation to retain counsel to represent the IWO on the merits of the cause before the Board (J.A. 32-36).

The former officers filed their motion for leave to intervene prior to the entry of the Board's order directing the IWO to register. The Board denied this motion and in the absence of appearance by the IWO entered a registration order against it by default pursuant to Section 13(d)(2) of the Act (J.A. 51-52). Approximately two weeks after the registration order had been entered the former members filed their motion to vacate the registration order and for leave to intervene and defend. The Board denied this motion (J.A. 62).

Both groups of Petitioners asserted that they were entitled to intervene as of right on the following grounds (J.A. 4, 58-59).

1. That a registration order against the IWO would automatically result in the imposition of serious sanctions and disabilities against Petitioners and all other IWO members.

2. That since the IWO was not defending itself the

of the corporation * * * " *In Re Chicago, R.I. & P. Ry. Co.*, 1945, 149 F. 2d 529, 531 (C. A. 7), reversed on other grounds, 327 U. S. 161. This was patently done in the hope that Judge Greenberg's original order under which it is admitted that Petitioners were restrained from representing the IWO (Pets. br. 51-52) (R. 322) would not receive the comity it was entitled to at the hands of the Board. Furthermore, Petitioners admit that they intend to defend the IWO if permitted to intervene. (Pets. br. 11, 16).

interests of Petitioners and the other members were not represented in the proceeding.

That they were prepared, if permitted, to defend the IWO on the ground that the Superintendent of Insurance was in joint or exclusive management of the IWO since December, 1950, and that therefore the IWO was not a Communist-front organization nor dominated and controlled by, nor operated to aid and support the Communist Party.

THE ACT

The Act provides for administrative proceedings before the Board, upon petitions of the Attorney General, to determine whether or not organizations shall be required to register as Communist-front organizations (Sec. 13).

By definition, a Communist-front organization is an organization which "(A) is substantially directed, dominated or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization . . ." (Sec. 3(4)).

A "Communist-action" organization is defined as an organization which "(i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title." (Sec. 3 (3)).

Section 13 of the Act governs the administrative proceedings before the Board and provides in pertinent part for the Board to either order an organization to register as a Communist-front or to order the Attorney General's petition denied, depending upon whether after hearing the Board has determined the character of the organization to be that of a Communist-front or not. (Secs. 13 (g),(h)).

Section 13(d)(2) permits the Board to issue a registration order against an organization by default in the case of its declining or failing to appear. (Sec. 13(d)(2)). The order involved here was issued pursuant to this section. (J.A. 51-52).

An organization required to register as a Communist-front organization must register with the Attorney General and furnish him information as to the identity of all individuals who were officers of the organization during the twelve months next preceding the registration as well as a detailed financial accounting. (Sec. 7(d)).

The failure of an organization to register when required by a final registration order⁵ is punishable by criminal penalties against those individuals who, at the time when the duty to register arises, are acting in the capacity of executive officer or secretary of the organization, etc. (Secs. 7(h), 15).

When an organization is registered or required to be registered by a final Board order it becomes unlawful for an individual to hold non-elective federal employment and to apply for or hold a passport if he is a member of the organization at the time he holds such non-elective federal employment or passport or applies for the latter. In addition, there are other sanctions having to do with naturalizations, denaturalizations and deportations.

THE IWO

The IWO is a fraternal benefit society organized as such under the New York insurance laws. It has approximately 100,000 former members,⁶ who are holders of insurance policies issued by the IWO and who reside in many states.

Prior to the Board proceeding, the Superintendent of Insurance of the State of New York had, on December 15, 1950, initiated an action in the Supreme Court of New York State against the IWO, asking that the IWO be liquidated and dissolved for the reason, among others, that it was dominated and controlled by the Communist Party, U. S. A.

Hearings covering eleven weeks were then held before the New York Court, as a result of which the IWO was ordered dissolved on August 24, 1951, for the reasons that "while

⁵ A registration order becomes final upon the exhaustion of judicial review. (Sec. 14(b)).

⁶ See footnote 2, supra.

it purported to be an insurance corporation and was chartered on that basis, it actually was a political organization created for the purpose of disseminating Communist doctrine and it therefore was guilty of obtaining its charter through fraud; and further, that this political party [Communist Party, USA] dominated and controlled the affairs of the respondent." As the New York Court characterized its own order, 'Pending ultimate dissolution the officers of the corporation were permitted to remain in joint control with the Superintendent of Insurance, but the officers were restrained from acting in any capacity unless they first obtained the approval of the Superintendent of Insurance and then of the Court.'" (J. A. 32-33).

Supervision and control of the IWO continued in this form until December 15, 1953, the intervening period having seen the New York Court upheld throughout appeals culminating in denial of certiorari by the United States Supreme Court. On that date, pursuant to a further order of the New York court, the joint supervision was terminated and the Superintendent was placed in sole control pending the effectuation of reinsurance and the dissolution of the organization. (J. A. 33). He promptly discharged all the officers of the IWO, and disbanded all lodges of the IWO. (J. A. 64-65, 66, 67, 68, 70).

The nature of this control during appellate review of the New York decision was such that the subversive activity of the IWO quite possibly continued. (J. A. 63). Although such had been enjoined by court order, the Superintendent did not supervise the activities of all the lodges throughout the nation nor was there any way in which this subversive activity could have been detected by the Superintendent. Indeed, the officers of the organization were permitted to travel around the country as they wished busying themselves with the "fraternal" affairs of the IWO, which activities remained completely unsupervised both on a local and a national level. (J. A. 72).

THE ADMINISTRATIVE PROCEEDING

On April 22, 1953, the Attorney General filed his petition with the Board asking that the IWO be ordered to register as a Communist-front organization, and on August 21, 1953, filed an amended petition. (J. A. 11-23).

On May 1, 1953, the IWO filed a motion with the Board and on May 29, 1953, entered a General Appearance. (J. A. 37). Subsequently, the Board entertained numerous IWO motions and eventually fixed the answer date as October 19, 1953. The IWO, after having made an unsuccessful attempt in the United States District Court for the District of Columbia to enjoin the Board proceedings, filed an amended answer on November 2, 1953. (J. A. 38-39).

On November 3, 1953, the Board noticed the matter for the taking of evidence on December 1. (J. A. 39). On November 6, a motion was filed by the IWO asking for postponement of the hearing date to January 19, 1954. This was opposed by the Attorney General, and denied by Board order of November 13, 1953.

On November 19, the Board was informed by counsel for the IWO that, pursuant to authorization from the Superintendent of Insurance, he had been retained to represent the IWO only through the initial motion stages of the Board proceeding and that the Superintendent had not authorized the retention of counsel to appear for hearing. He later indicated that he considered this letter as a withdrawal of his appearance as IWO counsel before the Board. (J. A. 39).

On November 27, a motion was filed by the Attorney General to postpone the hearing to January 4, 1954, accompanied by a letter dated November 25 addressed to Honorable Herbert Brownell, Jr., from Honorable Alfred J. Bohlinger, Superintendent of Insurance of the State of New York. On November 30, this motion of the Attorney General was denied by order of the Board, and the hearing for the taking of testimony was ordered to proceed on December 1 as previously scheduled. (J. A. 39).

In the meantime, the former officers requested the Superintendent to authorize the retention of counsel to represent

the organization at the hearing. He refused. (J. A. 40). Late on the afternoon of November 30 (R. 129), the former officers moved the New York Court for leave to retain counsel and represent the IWO before the Board.

At the hearing on December 1, 1953, the Attorney General appeared and indicated that he was ready to proceed. No one appeared for the IWO. The Attorney General moved for a default registration order. However, on being informed of the motion pending in the New York proceeding, the Board continued the matter to December 10. (J. A. 40).

On December 10, the Attorney General renewed his motion for a default order. The Board reserved decision and on the following day set the hearing for the presentation of evidence for December 16.

THE MOTION OF THE FORMER OFFICERS FOR LEAVE TO INTERVENE

At the hearing on December 16, counsel for the Superintendent appeared for the sole purpose of presenting the order and opinion of the New York court of December 15 (J. A. 32-36) in which that court denied the motion of December 1, and advising the Board that the Superintendent had assumed sole control of the IWO. No one appeared for the IWO, and the Attorney General renewed his motion for a default judgment. (J. A. 41, 42).

Two of the former officers, Greene, General Recording Secretary, and Saltzman, General Vice-President, appeared in person, without counsel, and moved to intervene on their own behalf and on behalf of the other former officers, Kent, General President, Shipka, General Secretary-Treasurer, and Milgrom, Executive Secretary, on their own behalf as officers and members of the IWO, and on behalf of the other members of the IWO. (J. A. 41-42).

This motion and the Attorney General's motion for a default order were set down for argument before the Board on January 4, 1954. (J.A. 42). At that time counsel for the Attorney General appeared; Mr. Paul W. Williams and Mr. James B. Henry, Jr., Special Assistant Attorneys General of the State of New York, appeared specially on

behalf of the IWO *qua* the Superintendent of Insurance of the State of New York; and Mr. John J. Abt appeared as counsel for Dave Greene, Rubin Saltzman, Rockwell Kent, Peter Shipka and Sam Milgrom, applicants for intervention individually and as officers and members of the IWO and on behalf of the other members of the IWO. (J.A. 42).

Mr. Williams stressed that the position of the Superintendent of Insurance, being in sole supervision of the IWO, was that "he and he alone is authorized to appear on behalf of the IWO as a corporation and he and he alone is authorized and can appear on behalf of the members of the IWO". (R. 229). On this basis Mr. Williams opposed Mr. Abt's appearance and the intervention of the aforementioned individuals as officers and on behalf of the some one hundred thousand members of the Respondent. He also stated that the Superintendent would not defend the IWO because it was a Communist organization. (J.A. 42-43).

The Attorney General also opposed the intervention and again moved the Board to grant his motion for a default order. Counsel for the Attorney General represented, and Mr. Williams agreed (R. 268), that under the applicable law and rulings of the courts of New York the IWO was still in legal existence as a corporate entity. (J.A. 43-44).

The former officers urged that they were entitled as of right to intervene on their own behalf and on behalf of the members of the IWO as a class. In support of that position, they asserted that the entry of a registration order against the IWO would result in the imposition of the following sanctions upon them and upon the other members of the IWO: (R. 323-6; J.A. 44)

1. As officers, they would be subject to the criminal penalties of section 15 of the Act in the event of the failure of the IWO to register as a "Communist-front" organization.

2. As members, they and each of the other members of the IWO would be subject to one or more of the disabilities imposed by the Act with reference to federal employment, passports, deportation, naturalization and the revocation of naturalization. (J.A. 44).

THE JANUARY ORDER AND REPORT OF THE BOARD

On January 14, 1954, the Board ordered the IWO to register as a Communist-front organization under Section 13(d)(2), which provides that in the case of an organization declining or failing to appear at a hearing accorded to it by the Board "the Board may, without further proceedings, and without the introduction of any evidence, enter an order requiring such organization . . . to register . . ." (J.A. 51-52). It accompanied its order with a report outlining its reasons for refusing to permit the former officers to intervene, to-wit:

(I) that the former officers were not entitled to intervene on their own behalf:

(A) as officers because in the particular circumstances of the IWO they would not incur criminal penalties in the event of a registration order;

(B) as members because their personal situations were not shown to be such that they would be adversely affected by the provisions of the Act respecting federal employment, passport privileges, naturalization, denaturalization, and deportation should a registration order be issued against the IWO;

(II) That the former officers were not entitled to represent the other members of the IWO because:

(a) the Superintendent of Insurance opposed the intervention on behalf of the members and represented to the Board that the applicants had no authority to represent the other members and might have been violating the court order in attempting to do so;

(b) they had interests foreign to and conflicting with those of the rank and file members of the IWO whom they sought to represent;

(c) they made no showing that the other members had notice of or had acquiesced in the request for class intervention or that there was a "class" interest susceptible to such representation. (J.A. 45-50).

THE MOTION OF THE FORMER MEMBERS FOR LEAVE TO INTERVENE

Some two weeks after the Board had issued its order requiring the IWO to register as a Communist-front organization, two former members of the IWO (Ossip and Collins) moved the Board to permit them to intervene and defend the proceeding on their own behalf and on behalf of all other members of the IWO, vacate the order of January 14, 1954, and set the proceeding down for hearing pursuant to Section 13 (c) of the Act.

Affidavits of the former members, filed in support of their motions, recited (J.A. 53-57):

(1) That they were United States citizens and members of the IWO; that neither of them was or had been a member of the Communist Party, and that both were eligible to apply for and hold non-elective federal office and to apply for and receive passports.

(2) That many IWO members were non-citizens, some of whom had applications for naturalization pending and others of whom intended to apply for naturalization; that some citizen-members were naturalized subsequent to January 1, 1951; that some members were federal employees, and that many members were eligible to apply for and hold federal employment and to apply for and receive passports.

(3) That unless the motion to intervene was granted and the Board's registration order set aside, they and all other IWO members would be subject to one or more of the sanctions of the Act with reference to federal employment, passports, deportation, naturalization and revocation of citizenship.

(4) That the members of the IWO were so numerous that it was impractical to join them in the proceeding; that many were unaware of the pendency of the proceeding and its effect on their rights, and others were unaware of the refusal of the Superintendent to defend or of the entry of a default registration order.

(5) That Ossip did not learn of the refusal of the Superintendent to defend the proceeding or of the Board's denial of intervention to the former officers

and the entry of the default order until January 27, 1954, and that Collins did not learn of these facts until January 18, 1954.

Their affidavits further asserted that the IWO was not a Communist-front organization and was not dominated and controlled by or operated to aid and support the Communist Party but that, since December, 1950, it had been under the joint or exclusive management of the Superintendent of Insurance and operated to effectuate the policy of the insurance laws of New York. Applicants stated that if permitted to intervene, they were prepared to present evidence of these facts and to defend the proceedings on the aforementioned grounds.

On February 12, 1954, the Attorney General filed a memorandum in opposition to these motions. (J.A. 57-58).

THE MARCH MEMORANDUM OPINION AND ORDER OF THE BOARD

On March 4, 1954, the Board issued a memorandum opinion and order denying this latter motion to intervene after pointing out that the Congressional findings in Section 2 of the Act indicated that it was not in the public interest for proceedings before the Board to be unduly protracted and that Mr. Abt, who had previously represented the former officers in their motion to intervene, also represented Ossip and Collins who, by alleging that they were not members of the Communist Party, were evidently seeking to develop a proposition that these additional facts tended to establish an interest which would justify intervention.

The Board denied the motion of Ossip and Collins for the reasons that:

(1) Although they were apparently informed of the New York State proceeding prior to the litigation of the question of the IWO representation before the Board in that proceeding, they nevertheless did not move to intervene at an earlier date.

(2) If permitted to intervene they intended to defend on the ground that the Superintendent of Insurance had been in joint or exclusive control of the IWO since 1950, in spite of the fact that these facts were already before the

Board and that the self-same Superintendent of Insurance represented to the Board through counsel that the New York State authorities had not attempted to police or supervise the meetings of some 1700 lodges of the IWO throughout the country and that there was no method by which any subversive activity could have been detected or punished or brought to their attention. The Board further pointed out that Ossip and Collins, who were rank and file member policyholders resident in New York, made no showing that they possessed information or knowledge as to the activities of the IWO membership country-wide.

(3) Applicants made no showing that they would sufficiently represent the other IWO members as a class or that there was a class susceptible of such representation.

(4) It was one of the primary objectives of the New York State proceedings to protect the interest of the rank and file members of the IWO, and the New York State Superintendent of Insurance, and he alone, could represent them.

(5) Although they contended in their own behalf that they were presently entitled to federal employment and passport privileges, they made no showing that they have or ever intended to apply for such privileges.

(6) Their eligibility for federal employment and for passport privileges was highly questionable since they were members of an organization which the New York Courts had found to be Communist controlled. (J.A. 58-62).

On March 12, 1954, both the former officers and the former members who had been refused permission to intervene filed their Joint and Several Petition for Review of the January 14, 1954, default Order of the Board.

STATUTES INVOLVED

The pertinent statutes appear in the appendix to this brief.

STATEMENT OF POINTS

1. This court lacks jurisdiction of this matter because Section 14(a) of the Act provides only that aggrieved parties may have judicial review of orders issued after hearing pursuant to subsections (g), (h), (i) or (j) of

section 13 whereas the order involved here is a default order issued pursuant to section 13(d)(2) of the Act.

2. The Board was correct in refusing to permit Petitioners to maintain a derivative action on behalf of the IWO, an organization in receivership.

3. The question of intervention in a Board proceeding is a matter for the Board's sound discretion, and the Board, in refusing Petitioners permission to intervene, exercised its discretion in a reasonable manner.

4. The Board was correct in refusing to permit Petitioners to intervene and defend the IWO on behalf of the other members of the IWO as a class.

5. The order of the Board was not issued in violation of the Fifth Amendment.

SUMMARY OF ARGUMENT

I

This Court lacks jurisdiction of this matter because Section 14(a) of the Act, upon which Petitioners rely to maintain this Petition in this Court, provides only for the review of orders issued after a hearing, as distinguished from a default order which is the type of order here involved. Even were we to assume, *arguendo*, that Petitioners have a right to judicial review under the provisions of Section 10(b) of the Administrative Procedure Act, that Act at most only provides Petitioners with review by an original action in any court of competent jurisdiction which cannot mean direct review in this Court.

Petitioners are unable to bring themselves within the definition of "party" in Section 14(a) of the Act and therefore are not allowed direct appeal to this Court.

II

Petitioners were rightfully refused permission to intervene and assert their claimed derivative right to defend in the Board proceeding because the IWO was under the sole supervision of the New York State Supreme Court and the New York State Superintendent of Insurance at the time of the attempted intervention and remains under such con-

trol to date. Under the circumstances in this case, the IWO is in legal contemplation in receivership.

But because the IWO was in receivership the right to represent the IWO rested exclusively in the Superintendent of Insurance under the New York State Supreme Court; the rule asserted by Petitioners as authorizing them to maintain a derivative action did not apply, with the result that they were precluded from maintaining a derivative action. Their proper course was to request the Superintendent and the New York State Supreme Court to assert their claimed rights and, if they were unsuccessful in those quarters, their remedy lay in an appeal therefrom. They pursued this course and were unsuccessful. The Superintendent subsequently expressed the opinion that it would be "ridiculous" for him to defend the IWO because it was a subversive organization (J.A. 43), and the receivership court clearly implying the absurdity of permitting the IWO to relitigate the question of its Communist domination since this very court had already found it to be such. (J.A. 35).

III

The law is explicit that unless a particular statute grants an express right of intervention the question of permitting interventions is for the tribunal's sound discretion. Interventions are not made a matter of right under any provision of the Act, Board regulations, or the Administrative Procedure Act. The Federal Rules of Civil Procedure regarding interventions have not been made applicable to administrative proceedings by the Administrative Procedure Act. Accordingly, the decision to permit interventions rests within the sound discretion of the Board.

It was a sound exercise of the Board's discretion, in the interests of an orderly and reasonably expeditious proceeding, to require applicants for intervention to show a substantial interest in the outcome of the proceeding as well as an intent and ability to present a meritorious defense. The former officers made no showing that their interest would be substantially affected as members of the IWO. Petitioners are not members of the IWO, but rather are

only insurance certificate holders by reason of the actions of the Supreme Court of the State of New York and the New York State Superintendent of Insurance. Since they are no longer members of the IWO, they are not affected by Sections 5 and 6 of the Act concerning the issuance of passports and federal employment because these sections are in terms applicable only to members of an organization registered or required to be registered. Moreover, were we to assume these former officer Petitioners could be affected by Sections 5 and 6 of the Act, their past Communist activities have already made Federal employment and passports unavailable to them. The board correctly took official notice of the determination of the New York State Supreme Court.

Since this administrative tribunal has the primary function of protecting the public interest, it has the duty to ascertain the facts when they have not been put in the record by the parties, and the Board was under the duty to ascertain whether those attempting to intervene would be aggrieved by a final order and whether their interests conformed with those of the people they sought to represent.

Turning from consideration of the effect of the Board order on the former officer Petitioners as IWO members, it is equally clear that they have not shown their interests would be substantially affected as officers of the IWO. Since Petitioners were deposed as officers on December 15, 1953, they could not come under a duty to register the IWO under section 7(h) of the Act because that section imposes a duty only upon those individuals who are officers or acting as such at the time the duty to register arises.

The Petitioners who are only former members likewise made no showing that their interests would be substantially affected. Since the New York State Supreme Court has relieved all members of their status as members, these former members, like the former officers, will not be affected by a registration order. Likewise, as discussed with respect to the former officers, it is quite likely that federal employment and passport privileges are unavailable to them anyhow if they have continued their association with an organi-

zation determined to be Communist controlled by the New York courts. Furthermore, they were properly refused permission to intervene because they were guilty of laches in delaying their application until approximately a month and a half after they should in the exercise of due diligence have been cognizant that the IWO was not going to be represented before the Board and two weeks after the Board's order was issued.

Neither group of Petitioners indicated that they intended to assert a meritorious defense. Both groups of Petitioners indicated that they intended to present a defense premised upon the argument that since the New York Court and the Superintendent were in control of the IWO since 1950, it could not have been controlled by and operated on behalf of the Communist Party. This defense is lacking in merit because the Superintendent's representatives indicated to the Board the distinct possibility that the subversive activity of the IWO continued on every level subsequent to December 15, 1950.

IV

Both groups of Petitioners rely upon Rule 23 of the Federal Rules of Civil Procedure to maintain their purported class action on behalf of the remaining former members. Even if Rule 23 has applicability to administrative proceedings, which we deny, this Rule requires that those who would maintain an action on behalf of others must notify the court that "they will fairly insure the adequate representation of all" and this means that the interests of the persons seeking to represent the class must be co-extensive with the interests of the remaining members of the class so that there is no conflict of interest. Here, because there had been innocents in the IWO, together with the Communist element, the Board correctly determined that there was no class susceptible of representation. The blameless individuals might well have preferred not to assert a defense since they had been apprised of the true character of the organization, and this alone creates a distinct conflict of interest between them and those others, particularly the Communist officers, who desired to defend the IWO.

Petitioners' lack of notice to and failure to show the acquiescence of the class, together with the fact that only the Superintendent could look after the interests of the class were matters properly considered by the Board in determining whether Petitioners assured the adequate representation of the class. The former members were properly refused permission to intervene on behalf of the class on the foregoing grounds. The Superintendent, who was protecting the rights of the class in the best manner possible, was the only competent guardian of their interests.

V

Since Petitioners were rightfully refused permission to intervene and defend the IWO in the Board proceeding, there has been no denial of Due Process.

ARGUMENT

I

This Court Lacks Jurisdiction of This Matter Because It Is Only Empowered To Review Orders of the Board Issued After Hearing Whereas the Order Involved Here Is a Default Order

Analysis of Section 14(a) of the Act and the subsections of Section 13 referred to therein, which is the only special statutory review procedure claimed by Petitioners to afford jurisdiction of this matter to this Court, clearly reveals that the Act does not contemplate that every type of order which the Board is empowered to issue is entitled to direct judicial review in this Court. To the contrary, on its face the Act envisions direct judicial review in the Court of Appeals only of those orders issued by the Board after the receipt of evidence and the formulation of a record embracing all the factual issues in the case.

Section 14(a) of the Act, the section invoked by Petitioners in their Joint and Several Petition for Review to show

jurisdiction and venue of this cause in this Court (J.A. 6) provides in pertinent part:

“Judicial Review”

“Sec. 14(a). The party aggrieved by any order entered by the Board under subsection (g), (h), (i), or (j) of section 13 may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall . . .”

An aggrieved party is permitted review in the Court of Appeals for the District of Columbia Circuit of only certain kinds of orders—namely those entered by the Board under subsections (g), (h), (i), or (j) of section 13. The words of the statute must be given their ordinary and explicit significance unless to do so leads to an unreasonable result plainly at variance with the evident purpose of the legislation (*Lincoln v. Ricketts*, 1936 297 U.S. 373, 376) and their normal meaning is presumed (*Southern Ry. Co. v. U.S.*, 1911, 222 U.S. 20, 25) in the absence of a clear showing that something else was meant (*United States v. First National Bank*, 1914, 234 U.S. 245, 258) and unless some strong reason to the contrary appears. Petitioners, to maintain their standing before this Court, must demonstrate that Section 14(a) should not be read literally. As is established by Petitioners own petition in this court (J.A. 5, 8), and by the January 14, 1954, order of the Board (J.A. 51), the order involved here was issued pursuant to Section 13(d)(2) of the Act, the section providing for default orders in the event a party fails to appear at a hearing accorded him, and not pursuant to subsection (g), (h), (i), or (j) of Section 13, subsections dealing exclusively with Board orders issued after hearing and upon written findings of fact.

In view of the maxim "*expressio unius est exclusio alterius*" and the precision and clarity with which Section 14(a) enumerates the specific sorts of orders susceptible of review in this Court, in sharp contrast to the more general terms of many other review provisions,⁷ it seems certain the

⁷ The Securities Act, "* * * an order of the Commission * * *" 48 Stat. 80 (1933), 15 U.S.C. Sec. 77i (1946); the Securities Exchange Act, "* * * an order issued by the Commission in a proceeding under this chapter * * *" 48 Stat. 901 (1934), 15 U.S.C. Sec. 78y (1946); the National Labor Relations Act, "* * * by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order * * *" 49 Stat. 455 (1935), 29 U.S.C. 160f (1946) as amended; the Natural Gas Act, "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order * * *" 52 Stat. 831 (1938), 15 U.S.C. Sec. 717r(b) (1946).

Act contemplates that those orders issued pursuant to subsections (g), (h), (i), or (j) of Section 13 and only those should be the subject of direct judicial review in this Court. However, since the statutory scheme is nowhere better illustrated than by the symmetry of these interlocking sections, a brief glance in their direction should prove informative.

Each of the subsections of Section 13, namely (g), (h), (i), and (j) referred to in Section 14(a), *supra*, begins with the words: "If, after hearing upon a petition . . ." It becomes clear when one considers the perfect identity of the first six words of each of these subsections in conjunction with the complete absence of provision for review in this Court of any order except those issued pursuant to hearing, that the review section was designed to provide direct review in this Court only of orders issued subsequent to a hearing on the merits. A default order does not fall within that category, and for that reason it is submitted that section 13(d)(2), pursuant to which the order here involved was issued, was omitted from Section 14(a) in order to limit direct judicial review in this Court to those orders reached after a hearing.

This point of view derives reinforcement from the provisions of Section 14 (a). It specifies that the Board shall file in the Court of Appeals for the District of Columbia Circuit "a transcript of the entire record in the proceeding including all evidence taken . . .", that "the findings of the Board as to the facts . . . shall be conclusive", etc. Compare *United Gas Pipe Line v. Federal Power Com'n.*, 1950, 181 F. 2d 796 (C.A.D.C.).

Therefore, because the judicial review section of the Act utterly fails to provide in terms for the direct judicial review of Section 13(d)(2) default orders, Petitioners asserted jurisdiction in this Court suffers from a fatal lack of statutory authority.

We are, therefore, confident that the Court will determine that Section 14(a) does not provide judicial review of the type of order involved here and will accordingly decline review. "But the Power Act contains a distinctive formulation of the conditions under which resort to the courts may

be made and Congress determines the scope of jurisdiction of the lower federal courts." *Federal Power Com'n. v. Pacific Power and Light Co.*, 1939, 307 U.S. 156, 159. "But the power of the court to grant the relief prayed depends upon the jurisdiction conferred upon it by the statutes of the United States . . . There can be no question of the power of Congress to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E. G. Skinner & Co.*, 1938, 303 U.S. 323, 327, 330. See also *Kline v. Burke Constr. Co.*, 1922, 260 U.S. 226, 234; *Case of the Sewing Machine Companies*, 1873, 85 U.S. 553, 578; *Cary v. Curtis*, 1845, 44 U.S. 235, 244.

So much for Petitioners' contention that jurisdiction and venue in the Court are afforded by Section 14(a). Their assertion (J.A. 7) that jurisdiction and venue exist in this court by virtue of Section 13(g) merits no discussion at all. The Board order recites that the order was issued pursuant to Section 13(d)(2) of the Act (J. A. 51); the January 14, 1954, report of the Board states that the order involved here was issued pursuant to Section 13(d)(2) of the Act (J. A. 51; Petitioner's Joint and Several Petition for Review admits that the order involved herein was issued pursuant to Section 13(d)(2), and the fact that the order was not issued "after a hearing" as required by Section 13(g) is nowhere more clearly indicated than in the January 14, 1954, report of the Board. (J.A. 50-1).

Since there is nothing in the judicial review provision of the Act to support the petition, Petitioners fall back to the review provision of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. Sec. 1009 (1946). It follows in pertinent part:

"JUDICIAL REVIEW"

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) RIGHT OF REVIEW—Any person suffering legal wrong because of any agency action, or adversely affected

or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

“(b) FORM AND VENUE OF ACTION—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction.”

There is no consolation for Petitioners here. Section 10(a), as is indicated by both its title and its text, does not concern itself with jurisdictional matters but is simply a statement of the persons entitled to judicial review, irrespective of the forum where such review might properly be obtained. (See Attorney General's Manual on the Administrative Procedure Act, pages 95-6). Indeed, even a cursory reading of the text of Section 10(b) makes it obvious that this is the section of the Administrative Procedure Act written to deal with the question of jurisdiction and venue for judicial review. (See Attorney General's Manual on the Administrative Procedure Act, pages 96-8).

Since the special statutory review proceeding is unavailable to them and since Section 10(a) is obviously of no help to them, Petitioners must, if they are to maintain this appeal in this Court, rely upon Section 10(b) of the Administrative Procedure Act. Applying this section to the case at hand, it becomes clear that under 10(b) the Board order is reviewable only by “[1] any special statutory review proceeding relevant to the subject matter in any court specified by statute or, [2] in the absence or inadequacy thereof, [by] any applicable form of legal action . . . in any court of competent jurisdiction.” (Enumeration added.)

As has been pointed out above, Section 14(a) of the Act, relied on by Petitioners to support their petition in this Court, contains no provision for the review of the default order involved herein and, therefore, no “special statutory review proceeding” exists for their benefit. This being the

case, assuming *arguendo* that Petitioners are in any way entitled to judicial review, their proper course was to seek such review by means of the "applicable form of legal action . . . in any court of competent jurisdiction" of Section 10(b) of the Administrative Procedure Act.

However, ". . . these provisions for review by 'any applicable form of legal action' deal not with appellate court review but with review by an original action in a court of competent jurisdiction. The Court of Appeals is not such a court unless especially authorized by statutory grant of power. We are not in any doubt that this court has no such jurisdiction and that the petition must be dismissed." *City of Dallas, Texas v. Rentzel*, 1949, 172 F. 2d 122, 123 (C.A. 5) certiorari denied 338 U.S. 858. The jurisdiction of the Court of Appeals is purely statutory. *In Re Philadelphia & Reading Coal & Iron Co.*, 1939, 103 F. 2d 901, 903 (C.C.A. 3); *Leimer v. State Mut. Life Assur. Co.*, 1939 106 F. 2d 793 (C.C.A. 8); *United States v. Agne*, 1947, 161 F. 2d 331 (C.C.A. 3). While not necessary to this Court's decision regarding its jurisdiction, it may not be amiss here to note the possible availability to Petitioners of a timely action in District Court.

Petitioners' assertion (Pets. br. 60) that the Board attempted to oust this Court of jurisdiction by labeling this order as a default order issued pursuant to sec. 13(d)(2) of the Act (J.A. 51, 52), when it was not a default order issued pursuant to sec. 13(d)(2) because the facts assertedly do not authorize a default order is frivolous. Petitioners' suggestion that the Court of Appeals is justified in taking jurisdiction of this order, on the theory that the Court should first review an order to determine whether there was error so that, if such were found, it might then assume jurisdiction by saying that the tribunal mislabeled the order, would result in conferring jurisdiction upon this Court to review any and all administrative orders regardless of the pertinent statutory provisions.

Philadelphia Co. v. Securities & Exchange Com'n., 1947, 164 F. 2d 889 (C. A. D. C.) clearly does not support

Petitioners' position, dealing as it does with a situation wherein an administrative agency insisted that this Court had no jurisdiction by asserting that what was essentially an order and hence appealable was a regulation and therefore not appealable. It is undisputed that we are dealing with an order. To bring this case within the rule of *Philadelphia Co. v. Securities & Exchange Com'n.*, Petitioners would be required to show that this order was actually an order which should have been issued pursuant to subsection (g), (h), (i), or (j) of section 13 of the Act, but was simply labeled, by the Board, as a default order to disguise its true character. Petitioners cannot so show because the record is clear that the facts are to the contrary.

The Philadelphia Co. case actually supports Respondent's position since ". . . it is the substance of what the commission has purported to do and has done which is decisive." *Philadelphia Co. v. Securities & Exchange Com'n.*, 1947, 164 F. 2d 889, 900 (C. A. D. C.). Here the Board was requested to issue a default order (J. A. 40, 42, 43) (Pets. br. 8, 9, 12); purported to issue one (J. A. 51-52); and did in fact issue a default order (J. A. 2).

Assuming *arguendo* that Petitioners were aggrieved by the Board's action, since they were not aggrieved by an order "entered by the Board under subsection (g), (h), (i), or (j) of section 13" they are not such "parties" as are authorized by section 14(a) of the Act to obtain judicial review in this Court.

Furthermore, as is demonstrated by Arguments II and III, *infra*, Petitioners were not entitled as of right to be admitted as a party and therefore, are not "parties" within the meaning of Section 14. Section 14 allows direct appeal to this Court only to "the *party* aggrieved", and does not allow direct appeal to this Court to any persons who were not entitled to be parties in the Board proceeding.

The Board Correctly Refused to Permit Petitioners to Intervene and Exercise an Asserted Derivative Right to Defend Because the IWO was in Receivership

The New York State statutes concerning the liquidation of insurance companies, McKinney's Consolidated Laws of New York, Book 27, Insurance, Sections 510 to 546, inclusive, provide that such liquidation is effected by an order of the Supreme Court of the State of New York upon application of the New York State Superintendent of Insurance, Sections 513, 514. Section 514, subsection 2 of the Insurance Law provides that upon entry of such an order, "The Superintendent and his successors shall be vested by operation of law with the title to all of the property, contracts and rights of action of such insurer . . ." Pursuant to Section 536, subsection 3, "The superintendent . . . may avoid any transfer of, or lien upon the property of an insurer which any creditor, stockholder or member of such insurer might have avoided and may recover the property so transferred or its value from the person to whom it was transferred unless he was a bona fide holder for value . . ." Furthermore, he is authorized by Section 539 to, "subject to the approval of the court, sell or otherwise dispose of the real and personal property, or any part thereof, of an insurer against whom a proceeding has been brought . . ."

In view of the powers thus granted to the Superintendent and the fact that admittedly (J. A. 4), "his acts are measurably subject to the direction, supervision, and control of the court entering the order of liquidation", *Motlow v. Southern Holding and Securities Corp.*, 1938, 95 F. 2d 721, 724 (C. C. A. 8), certiorari denied, 305 U. S. 609, it is submitted that Judge Hand's determination that "the superintendent became in effect a receiver under the supervision of the state court," *Tolfree v. New York Title and Mortgage Co. et al.*, 1934, 72 F. 2d 702, 704 (C. C. A. 2) certiorari denied, 293 U. S. 619, squarely fits the present situation where

the uncontroverted facts are that the IWO was under the legal control of the New York State Superintendent of Insurance when Petitioners attempted to intervene (J. A. 3) by virtue of the pertinent sections of the New York State Insurance Law and the provisions of the liquidation order of the New York State Supreme Court entered pursuant thereto. But it is not necessary to argue whether the IWO was in receivership at the time of the attempted intervention as Petitioners admit that such was the legal status of the IWO at that time. (Pets. br. 52).

Now, assuming *arguendo* that, as Petitioners contend, there exists a valid defense to the Attorney General's petition in that the IWO, having been under the control of the Supreme Court of New York and the Superintendent since 1950, was not a Communist-front organization within the meaning of the Act, it was admittedly the primary right of the corporation to assert this defense. (Pets. br. 29, 31, 48, 49, 50) (R. 313, 334).

The cases are likewise in accord with the proposition that it is the primary right of the corporation to defend in corporate litigation. "Ordinarily the company represents all of the stockholders in the litigation. *In re Babcock et al.* (C. C. A.) 26 F. (2d) 153, 156; *Porter v. Sabin*, 149 U. S. 473, 13 S. Ct. 1008, 37 L. Ed. 815. In *In re Babcock, supra*, this court said: 'It is elementary that in corporate litigation the corporate stockholders are represented by the corporation, . . . *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827. *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, 463, 23 S. Ct. 157, 47 L. Ed. 256' ". *Austin et. al. v. Garard et al.*, 1932, 61 F. 2d 129, 130 (C. C. A. 7).

This right to defend is of the same nature as any claim or cause of action of the IWO and these rights are beyond doubt primarily in the corporation and not in the Petitioners who are as mere stockholders. *Hawes v. Oakland*, 1881, 104 U. S. 450; *Porter v. Sabin*, 1893, 149 U. S. 473, 478; *Kelly v. Dolan*, 1916, 233 Fed. 635, 638 (C. C. A. 3); *Swope v. Villard*, 1894, 61 Fed. 417, (C. C. S. D. N. Y.); *In re Swofford Bros. Dry Goods Co.*, 1910, 180 Fed. 549, 555 (D. C. W. D. Mo.).

But, because the IWO is admittedly in legal contemplation in receivership in the New York courts, the right to defend like any claim or cause of action rests exclusively in the Supreme Court of New York and the Superintendent of Insurance of that State. *In re Lawyers Mortg. Co.*, 1938, 169 Misc. 802, 824-28, affirmed 256 App. Div. 974; *Motlow v. Southern Holding and Securities Corp.*, *supra*, 1938, 95 F. 2d 721 (C. C. A. 8) certiorari denied, 305 U. S. 169; *Tolfree v. New York Title and Mortgage Co., et al.*, *supra*, 1934, 72 F. 2d 702 (C. C. A. 2) certiorari denied 305 U. S. 609. The Petitioners have always been empowered to revert to that court for the adjustment of their grievances, and the former officers have hitherto exerted that right in a belated effort to gain the court's permission to defend the IWO in the Board proceedings (J. A. 3, 31-36), the self-same relief they now seek here. The Supreme Court of the State of New York and the Superintendent of Insurance stand in the place of the management of the IWO. "It is a complete answer to this contention that a court of equity, by virtue of its supervision over all phases of liquidation of a financial corporation, possesses full discretion to permit or deny an application for intervention, The conduct of the liquidation is subject in all its phases to the supervision and control of the court, except insofar as the Legislature may have vested discretionary power in the Superintendent. Save for this, the court in its discretion may veto the acts of the Superintendent as liquidator, and is vested with a discretion which may override that of the Superintendent". *National Bondholders Corp. v. Joyce*, 1937, 276 N. Y. 92, 96.

Since the IWO is under the complete control of the Supreme Court of the State of New York and since that court has refused to allow Petitioners to defend the IWO before the Board there was no reason to circumvent the New York State Court by permitting them to assert any derivative right to defend. For, "Neglect and dereliction of duty can hardly be charged against a court; . . . The refusal of the court to direct suit upon an alleged cause of action seem rather to prevent a stockholder from suing thereon

than to give occasion for his doing so unless the court expressly authorized him to sue." *Swope v. Villard, supra*, 1894, 61 Fed. 417, 420 (C. C. S. D. N. Y.).

The law on the effect of receivership on derivative actions, which this is admitted to be (Pets. br. 41, 48, 49, 50) (R. 333, 334), is lucid and consistent throughout. It has been clear since *Porter v. Sabin, supra*, 1893, 149 U. S. 473, that, as the court possesses the authority and the duty to look after the interests of a corporation in receivership, the rule authorizing shareholders to assert derivative rights is inoperative because the reason upon which the rule is based fails, the shareholder thereafter looking not to his own action to vindicate the rights of the corporation but instead depending upon the receivership court to look after the corporation. The shareholder's proper course, after his corporation has gone into receivership, is to present to the receivership court all the facts in the case which he feels would justify the action which prior to receivership would have devolved upon him. Then the court, having determined for itself whether the shareholder has made out a valid case, may take such action as it deems is warranted by the facts or may abstain from doing anything. The shareholder can then, of course, appeal the decision of the receivership court. That is the course which has been unsuccessfully pursued in the case at bar.

Petitioners, having failed in their belated attempt to secure permission to defend from those lawfully in charge of the corporation, attempted to circumvent the will of the receiver (J.A. 3, 40) and of the receivership court (J.A. 3, 41) by asserting a derivative right which the cases clearly show had lapsed with the advent of the receivership. Now and at the time of the application to intervene Petitioners possessed no independent right to defend this proceeding before the Board apart from the express authorization of the New York State Supreme Court, and such authorization was refused.

The Supreme Court of the United States in holding that a stockholder's derivative action on behalf of their corpora-

tion could not be maintained due to the fact of the receivership stated:

“When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate, the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Wiswall v. Sampson*, 14 How. 52, 65; *Peale v. Phipps*, 14 How. 368, 374. *Booth v. Clark*, 17 How. 322; 331; *Union Bank v. Kansas City Bank*, 136 U. S. 223; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 297.

“It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver or may reserve to itself the determination of . . .” *Porter v. Sabin*, supra, 1893, 149 U. S. 473, 479.

To the same effect, in dismissing a stockholder's derivative suit the Circuit Court held:

“Appellant's remedy is not to file a petition and seek relief which is in the nature of a separate bill of complaint. They could, and should if the facts warrant it, bring to the receiver's and the court's attention, facts which disclose new assets and choses in action or liabilities for which the receiver might bring suit. If the receiver fails to pursue individuals and companies, be they officers or directors of the companies, after its attention has been brought to facts

showing such liability, the petitioner's remedy is clear. They may apply to the court and cause the receiver to be removed." *Austin v. Garard*, 1932, 61 F. 2d 129, 130 (C. C. A. 7).

See also *Kelly v. Dolan*, supra, 1916, 233 Fed. 635, 638 (C. C. A. 3) where the court dismissed a stockholder's derivative action on behalf of a railroad in receivership and in so doing held:

"... The Central Company [the railway] is not under the domination of its directors; there is no allegation of mala fide control on their part. On the contrary, the corporation has passed from their control into that of a court of competent jurisdiction and that court has on application declined to allow the receiver of such company to bring suit against the directors. Such being the case, it is manifest that the right of action of the corporation still remains in the corporation and its receiver, and forms part of the estate which that court is administering. To the present situation we may apply the language of the Supreme court in *Porter v. Sabin*, supra, 149 U. S. 480, 13 Sup. Ct. 1008, 37 L. Ed. 815, namely:

" 'The right of action remains part of the estate of the corporation within the exclusive custody and jurisdiction of the state court.' "

That the right of action which admittedly (R. 333-334) includes the assertion of a defense remains within the exclusive jurisdiction of the bankruptcy or receivership court has been repeatedly affirmed. *In re Swofford Bros. Dry Goods Company*, supra, 1910, 180 Fed. 549, 553, (D. C. W. D. Mo.); *Klein v. Peter*, 1922, 284 Fed. 797, 799 (C. C. A. 8); *Ames v. American Tel. & Tel. Co.*, 1909, 166 Fed. 820, 822-4 (C. C. Mass.); *Swope v. Villard*, 1894, supra, 61 Fed. 417 (C. C. S. D. N. Y.); *Reagan v. Midland Packing Co.*, 1925, 8 F., 2d 954 (C. C. A. 8); *Lewis v. Council*, 1923, 291 Fed. 148, 156-58 (D. C. E. D. N. Car.); *Lewis v. Lilliston*,

1937, 89 F. 2d 847 (C. A. D. C.); *Meyer v. Fleming*, 1945, 327 U. S. 161.

Petitioners could not show the Board that they were authorized by the Supreme Court of the State of New York to defend the IWO. Yet, where there is no allegation to the effect that the shareholders have been permitted by the receivership court to assert the derivative action, the court wherein it is asserted cannot know whether by entertaining the claim, it is improperly interfering with the court wherein the receivership is pending. *Lewis v. Lilliston*, supra, 1937, 89 F. 2d 847 (C. A. D. C.). Therefore, since Petitioners could not show that they had the permission of the New York State court, they were rightfully excluded from asserting their claimed derivative rights before the Board. Not only were Petitioners unable to show they had permission, but here the New York State court had, prior to the attempt to intervene, *refused* to permit the former officers to retain counsel to represent the IWO before the Board, (J. A. 32-36, 41, 45). The significance of this fact is patent in view of the language of the court in *Swope v. Villard*, supra, 1894, 61 Fed. 417, 420 (C. C. S. D. N. Y.) involving a shareholder's derivative action on behalf of his corporation against the receiver thereof:

"It is the fundamental doctrine, in regard to such stockholders suits as this; that the stockholder must have exhausted reasonable effort to cause action to be taken by the proper managers of the company's affairs. Such reasonable effort is not exhausted when the management is in a court, until such court has been asked to act, or to direct action by its receivers. It may well be doubted whether the refusal of such an application by the court would give a stockholder the right to sue. Neglect and dereliction of duty can hardly be charged against a court; especially in one federal court against another. The refusal of the court to direct suit upon an alleged cause of action would seem rather to prevent a stockholder from suing thereon, than to give occasion for his doing so, unless the court expressly authorized

him to sue. This seems to be the result of the decision in *Porter v. Sabin*, 149 U. S. 478, 13 Sup. Ct. 1008 . . .”

Indeed, “It is the general rule that, where a corporation is in the hand of a receiver, a stockholder cannot sue without the sanction of the court appointing the receiver.” *Klein v. Peter*, supra, 1922, 284 Fed. 797, 799. (C. C. A. 8). See also *Lewis v. Lilliston*, supra, 1937, 89 F. 2d 847 (C. A. D. C.).

The wisdom of the rule that a shareholder cannot assert a derivative right on behalf of his corporation, after it has gone into receivership, without the consent of the receivership court becomes apparent when viewed in the light of the facts in the case at bar. The New York State Superintendent of Insurance, who has managed the affairs of the IWO for approximately three and one-half years (J. A. 4, 5, 6) in an earnest effort to protect the interests of the thousands of innocent policyholders and of the State of New York, refused the former officers permission to defend (J. A. 40) (Pets. br. 8), and later indicated quite clearly through his representative that in his judgment it would be “ridiculous” of him to defend that organization. (J. A. 42, 43). The Superintendent’s refusal was upheld by the receivership court (J. A. 36) (Pets. br. 9), which in so doing implied that it was absurd to permit the IWO to relitigate the question of its Communist domination since the court had already found it to be such (J. A. 35). In view of this, it is submitted that this Court should not make it possible for these Petitioners, most of whom could not be expected to act in the best interests of the innocent members of the organization (J. A. 46-47) to intervene and defend on the sole basis “That the IWO was not a Communist-front organization as defined in the Act, but, on the contrary, had been under complete supervision and control of the Supreme Court of New York and the Superintendent since December, 1950”, (J. A. 4, 5, 6). The representative of that self-same Superintendent made it clear to the Board that the IWO could well have possessed the character of a Communist-front during this period (J. A. 63), because the

Superintendent did not attempt to police some seventeen hundred IWO lodges scattered around the country nor could any subversive activity have been detected by any method available to him (J. A. 72). On the contrary the officers of the IWO (J. A. 46, 47), were permitted by the Superintendent to travel around on "fraternal" business, as to which there was no supervision (J. A. 72).

III

The Question of Intervention in a Board Proceeding Is a Matter for the Board's Discretion, Which Discretion the Board Exercised in a Reasonable Manner in Refusing to Permit Petitioners to Intervene

1. The Question of Intervention Is A Matter For The Board's Sound Discretion

The Act contains no provision at all, mandatory or otherwise, regarding intervention in hearings before the Board nor do the regulations of the Board contain any such provisions. Indeed, the Act has committed to the discretion of the Board the determination of whether intervention should be permitted or denied in any particular case by providing in Section 12(g) that "The Board may make such rules and regulations, not inconsistent with the provisions of this title, as may be necessary for the performance of its duties". When this provision of the Act is viewed in the light of sections 13(d)(1), 13(e) and 13(f), which formulate the criteria which must be considered by the Board in its deliberations and require the Board to observe certain procedural rules, it is clear that the question of intervention before the Board falls within the scope of those "subordinate questions of procedure . . . the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—[which] were explicitly and by implication left to the commission's own devising, so long, of course, as it observes the basic requirement designed for the protection of private

as well as public interest.” *Federal Communications Commission v. Pottsville Broadcasting Company*, 1940, 309 U. S. 134, 138.

Prior to the advent of the Administrative Procedure Act the question of intervention was held by the courts to be within the discretionary powers of the particular tribunal, unless, of course, the particular statute involved granted the right to a potential intervenor. This discretion was unchallengable so long as it was exercised in observance of the basic requirement of fair play. See *Federal Communications Commission v. National Broadcasting Company, Inc. (KOA) et al.*, 1943, 319 U.S. 239, clearly indicating that there is a right of intervention only if the statute can be construed to grant it; and *Federal Communications Commission v. Pottsville Broadcasting Co.*, *supra*, 1940, 309 U. S. 134.

To be rightfully entitled to intervene within the meaning of section 2(b) of the Administrative Procedure Act (5 U. S. C. 1001) Petitioners must show that the particular statute or agency rules grant them that right, unless the Administrative Procedure Act has in some manner changed the law, as Petitioners contend (Pets. br. 28), to make the criteria of Rule 24(a) of the Federal Rules of Civil Procedure applicable to administrative as well as to judicial proceedings. “The rights of petitioners to intervene in this proceeding must be sought and found within the four corners of the Natural Gas Act.”, *Alston Coal Co. v. Federal Power Commission*, 1943, 137 F. 2d 740, 741 (C. C. A. 10).

Petitioners’ contention that Rule 24(a) is applicable to administrative proceedings might be answered by reference to Petitioners’ own statement that this rule “states the conditions under which intervention is a matter of right in Federal Court proceedings.” (Pets. br. 28). Petitioners’ cases in support of applying this rule to administrative proceedings are conspicuous by their absence. The Administrative Procedure Act says nothing about applying the Federal Rules of Civil Procedure to govern interventions,

despite the fact that if such a significant change were intended the words of the Administrative Procedure Act surely would have provided for it.

On the contrary, Section 5(b) of the Administrative Procedure Act makes the exercise of sound discretion an integral factor in these words: "(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment *where* time, the nature of the proceeding, and the public interest permit, . . ." (emphasis added). "Intervention in administrative proceedings is controlled by law at four levels—statutory provisions, agency rules, agency practices and judicial decisions", Davis Administrative Law (1951) ch. 16, sec. 203, p. 687. "These differences in origin and function [of judicial and administrative tribunals] preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts", Frankfurter, J., *Federal Communications Commission v. Pottsville Broadcasting Co.*, *supra*, 1940, 309 U. S. 134, 143.

And the practicalities of the situation afford probably the best illustration of the wisdom employed by the Congress in not attempting to impose any unyielding requirements on the Board in this respect.

The Act deals with organizations. It provides for an administrative proceeding before the Board upon the petition of the Attorney General to determine whether or not an organization shall be required to register as a Communist-action or Communist-front organization (Sec. 13); and if determined by the Board to be such an organization it must register with the Attorney General and furnish him with certain information respecting its officers and finances (Sec. 7(d)). However, although the Act deals primarily with organizations, it provides for the imposition of various sanctions upon the individual members of organizations determined by the Board to be Communist-action or Communist-front organizations. For example, it is unlawful for members to hold non-elective federal employment and to

apply for or hold passports (Secs. 5 and 6) and certain disabilities respecting exclusion and deportation from this country, naturalization and de-naturalization attach themselves under certain circumstances to alien and recently naturalized members of an organization required by the Board to be registered. (See Sec. 212(28)(E) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 182, 8 U.S.C. 1182; Sec. 241(a)(6)(E) of the Immigration and Nationality Act, 66 Stat. 204, 8 U.S.C. 1251; Sec. 313(a)(2)(H) of the Immigration and Nationality Act, 66 Stat. 240, 8 U.S.C. 1424; Sec. 340(c) of the Immigration and Nationality Act, 66 Stat. 260, 8 U.S.C. 1451).

In the light of these sanctions it is possible to foresee the result of a judicial determination that the question of intervention is not a matter best left to the sound discretion of the Board. By the very nature of the statute any member of an organization involved in the usual Board proceeding, no matter how irresponsible, maliciously motivated or uninformed he may be, upon an allegation of inadequate representation would have a perfect right to step in and make himself a party to the proceeding⁸ should Petitioners point of view prevail (Pets. br. 27-29). To thus make interventions a matter for the discretion of any proposed intervenors would cause the records to become unduly voluminous, the parties to become unnecessarily numerous, and the proceedings to become unmanageable and interminable.

The number of potentially interested persons would be limited in the ordinary case only by the number of individuals in the organization, which, as indicated by the case at bar,⁹ can be quite large. As the Board found, "it is in the public interest in proceedings of this nature as manifested by the Congressional findings in Section 2 of the Act, that

⁸ Assumedly, the singular factual background of this case which precludes Petitioners from intervening as of right even under the Federal Rules, *infra*, 50-1, could not be expected to recur very frequently.

⁹ The IWO is purported to have had 100,000 members (J. A. 53).

such proceedings should not be unduly protracted . . . ” (J.A. 60).

The question of whether an applicant should be permitted to intervene in a Board proceeding should be and is a matter properly within the sound discretion of the Board. It follows, therefore, under Petitioners' own reasoning (Pets. br. 28), since no one is entitled as of right to be admitted as an intervenor, the order of the Board did not violate either the Act or the Administrative Procedure Act. This being the case, Petitioners' contention that the Board had no authority to issue this order under Section 13(d)(2) because this section does not authorize the issuance of a default order in violation of the Administrative Procedure Act is irrelevant. Since it is irrelevant, Petitioners' attack (Pets. br. 60, ft. note 33), on Respondent's jurisdictional point discussed in Argument I likewise fails.

2. The Board Acted Reasonably in Refusing to Permit Petitioners to Intervene; Neither Group Showed That Their Interests Would Be Affected in Any Substantial Manner by a Registration Order Against the IWO and Neither Group Offered to Present a Valid Defense on the Merits.

It is certainly within the discretion of the Board to require that any person attempting to intervene in a proceeding before it at least show that he would be adversely affected or aggrieved by the threatened orders. If it were otherwise, it is obvious that anyone may intrude into a Board hearing at his own discretion for any of a myriad of motives, in the public interest or otherwise, which impel men to any given course of action.¹⁰ As elsewhere herein

¹⁰ The reasonableness and commonplace nature of such a requirement is evidenced by the following typical statutory provisions respecting intervention: "At the hearing any interested person may be heard in person or by his representative," Federal Food, Drug and Cosmetic Act, 52 Stat. 1055 (1938), 21 U.S.C. 371(e); "That * * * it shall be lawful to include as parties in addition to the carrier, all persons interested in or affected by the rate regulation or practice * * *", Interstate Commerce Act, 32 Stat. 848 (1903), 49 U.S.C. 42; "In any proceeding * * * the Commission in accord-

detailed, *infra*, 39-43, 46-49, Petitioners failed to sustain this burden. As Petitioners conceded in their representations to the Board (J. A. 4, 53-54), it is also well within the Board's discretion to require, as insurance that its time will not be wasted, anyone seeking to intervene and defend to make some showing that he intends and is capable of presenting a meritorious defense. Petitioners failed on this score as well, *infra*, 49-50.

A. The Former Officers Made No Showing That Their Interests Would Be Substantially Affected as Members Of The IWO.

With the exception of the argument that the former officers might be subject to criminal penalties should a registration order issue against the IWO (Pets. br. 39-41) it is clear beyond discussion that both groups of Petitioners rely exclusively on the assertion that as current members of the IWO they will, in consequence of a final registration order, suffer certain disabilities and sanctions as a result of their membership in the IWO. (Pets. br. 11, 15-16, 17-20, 22-23, 30-35, 41-44). However, if they are not members of the IWO at the present time those who attempted to intervene solely as members cannot possibly show that a registration order would affect them in any way, adversely or otherwise, since sections 5 and 6 of the Act which impose the disabilities apply in terms only to current members, and those who attempted to intervene as officers would be put to the necessity of relying exclusively on the assertion that as officers they might be subject to criminal sanctions

ance with such rules and regulations as it may prescribe, shall admit as a party any interested State, State Commission, State securities commission, municipality, or other political subdivision of a State, and may admit as a party any representative of interested consumers or security holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers." Public Utility Holding Company Act, 48 Stat. 832 (1935), 15 U.S.C. 79s; "Any person * * * may make application and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person," Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. 45b.

for failing to register the IWO in response to a registration order.

The fact is that none of the Petitioners are presently "members" of the IWO, albeit through no voluntary act or omission on their part or on the part of the society's former management. They were explicitly apprised of this fact by the New York State Superintendent of Insurance as long ago as January 20, 1954,¹¹ (App. 85-6). In spite of this the former members in their motion of February 1, 1954, represented themselves to the Board as current members of the IWO and represented that all the other former members of the IWO were likewise current members of the IWO so as to be subject to the sanctions contained in the Act (Pets. br. 15-16). It is to be noted that both groups of Petitioners continue to maintain this position without so much as a hint of their changed status (Pets. br. 19-20, 22-23, 30-35, 41-44) despite the fact that the lodges have been disbanded and they have been cognizant of the change in their situation since January, 1954. Since they are no longer members, it follows that neither group of Petitioners can, on the basis of membership, be aggrieved as members of the IWO.

Petitioners are indeed in a dilemma, for should they contend that the Superintendent of Insurance lacked the authority to relieve them of their status as members, then it is inconsistent for them to assert that the Board was in error in not regarding as controlling the same Superintendent's statement that he had dissolved the lodges (Pets. br. 58-59). This is particularly true in view of the fact that Petitioners and all other former members lost their standing as members as a direct and inseparable result of the dissolution which Petitioners claim to be valid (App. 85-6).

Actually there is no doubt that the IWO as a functioning

¹¹ That all the persons in the group sought to be represented by Petitioners are embraced within the action taken by the New York State Superintendent of Insurance is admitted by Petitioners who state, "It (IWO) has approximately 100,000 members who are also holders of insurance policies issued by the IWO * * *" (Pets. br. 5). But all the holders of insurance policies are now "Certificate Holders" as distinguished from members. (App. 85-6).

fraternal organization has been dissolved, existing today solely to effectuate the reinsurance plan. The Superintendent was placed in sole control of the IWO as the result of a proceeding which has been litigated through the New York State courts, the Supreme Court of the United States denying certiorari, and the order of sole control was affirmed on appeal (J. A. 32-3). Being in sole control he succeeded to the powers of the general council of the IWO which, under article 66 of the constitution and by-laws thereof, had the power to dissolve the lodges (R. 277).

Even if Petitioners could somehow establish that they remained members of the IWO, they nevertheless would not be hurt by a registration order because it is inconceivable that any court in the United States would consider applying criminal penalties to people who have been assured by the State of New York that they were no longer members (and hence nothing to fear) and would not be considered as such by reason of the solitary fact that they maintained their insurance in force (App. 86).

Furthermore, in view of the affiliations and activities of these former officers, the Board rightfully concluded that they would not be harmed by a registration order. All of these former officers except Mr. Rockwell Kent were determined by Judge Greenberg in the original New York State proceeding to be not merely active Communist Party members but also as "having participated in key Communist Party committees", in short, they have been found by Judge Greenberg to be top level Communist Party functionaries (J. A. 47). In them rested the responsibility for manipulating a vast and affluent organization, including unnumbered innocent people, as an instrument of the Communist Party (J. A. 28, 46-47) (Pets. br. 5).

Admitting that as Communist leaders they are ineligible for passports, Petitioners inform us that under Sec. 6 of the Act a registration order will deprive them of their right to burden the courts with test cases without being penalized if they lose. (Pets. br. 33). It is the threat to their imaginary chance of federal employment and this "right" of riskless challenge which the former officers contend entitled them to intervene and defend the IWO (Pets. br. 32-34).

But action of an administrative character has in the past had repercussions on many interests of a far more substantial nature than these without it being deemed obligatory to grant intervention.

For example:

A National Labor Relations Board order requiring that discharged employees be reinstated may make necessary the discharge of employees subsequently hired to make room for those to be rehired. *National Labor Relations Board v. Mackay Radio Company*, 1938, 304 U. S. 333. But the Board does not have to treat as parties all those subsequent employees whose jobs are endangered in the proceedings. *National Labor Relations Board v. Star Publishing Company*, 1938, 97 F. 2d 465 (C.C.A. 9). Furthermore, even action of the National Labor Relations Board which threatens a contractual relationship, as where a complaint alleges that contracts with employees are in violation of the Act, does not give rise to an obligation to make the contracting employees parties. *National Licorice Company v. National Labor Relations Board*, 1940, 309 U. S. 350, see also *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 1941, 313 U. S. 146, 155.

Clearly the illusory interests of these former officers are deserving of no more protection than the very real economic and contractual interests forming the basis of these N.L.R.B. cases. Indeed, their asserted right to government employment has already been judicially declared to be without the vale of the due process clause of the Fifth Amendment. *Bailey v. Richardson*, 1950, 182 F. 2d 46, 57 (C.A.D.C.), affirmed 341 U. S. 918, and they admit that as Communists they are excluded from passports. (Pets. br. 33).

The one former officer not found by Judge Greenberg to be a Communist Party functionary was found by the Board to be on public record as having been not merely a Communist sympathizer but rather a very active propagandist on behalf of the Soviet Union and the Communist philosophies, as well as one of the leaders of the IWO who operated this organization as a satellite of the Communist Party (J. A. 46-47). Thus, the Board was warranted in its sound

discretion to determine that his interests in regard to federal employment and passports were so slim as not to warrant his intervention (J. A. 49-50). The substance of Petitioners' contention here, as in the case of the other former officers, is that regardless how speculative, how contingent, how ephemeral, how remote the interest threatened, whether or not it is entitled to procedural protection, irrespective of the fact that as a practical matter these things are foreclosed to them, the Board is obligated to make them parties. The cases do not so hold. *National Labor Relations Board v. Star Publishing Company*, supra, 1938, 97 F. 2d 465 (C. C. A. 9). *National Licorice Company v. National Labor Relations Board*, supra, 1940, 309 U. S. 350.

Not only were the facts expressed in the New York Supreme Court opinion (*Application of Bohlinger, In re International Workers Order, Inc.*, 106 N.Y.S. 2d 953) a proper subject of official notice, but the Board had the obligation to investigate and decide upon these pertinent facts rather than to rely solely upon the record made before it. Petitioners' contentions (Pets. br. pp. 36-38) amount to an assertion that the Board, an administrative agency, can take official notice only of such matters as fall within the domain of judicial knowledge, e.g.: facts beyond dispute.¹² This would have the practical effect of virtually emasculating the administrative process which, to fulfill its primary function of protecting the public interest, is compelled to seize the initiative and conduct its own factual investigation.¹³ Certainly this is true where, as here, a summary proceeding in the nature of considering a motion to intervene is involved.

Petitioners' argument in this respect is answered in the words of Frank, J., in *Isbrandtsen Co. v. United States*, 1951, 96 F. Supp. 883, 892 (D.C.S.D.N.Y.):

"This is a somewhat surprising contention, to be contrasted with the following views of Commissioner Aitchson of the Interstate Commerce Commission

¹² American Law Institute, Comment on Rules 804(2) and (3) of Model Code of Evidence.

¹³ See Davis, *Administrative Law* (1951), Ch. 12.

concerning the obligations of administrative agencies; 'They are not expected merely to call balls and strikes or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in . . . The agency must always act upon the record made and if that is not sufficient, it should see that the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . . ' ''.

Since the Congressional findings in Section 2 of the Act indicate that the public interest will suffer in the event that proceedings before the Board are unduly protracted (J.A. 60), and since these former officers were attempting to intervene on behalf of thousands of former members of the IWO (J.A. 35) it behooved the Board to ascertain whether they would in fact be aggrieved by a final order and whether their interests were in conformity with those of the many persons whom they sought to represent (J.A. 47).

Petitioners' citation of *White v. Central Dispensary and Emergency Hospital*, 99 F. 2d 355, 358-59, 69 App. D.C. 122, and the footnote cases (Pets. br. 37) as authority for the proposition that the Board improperly took official notice of the New York opinion is but another manifestation of the delusion which persists in equating an administrative with a judicial proceeding. This case involved only a judicial proceeding and is patently not controlling here.

Assuming arguendo that the Petitioners' cases are pertinent,¹⁴ the proposition expressed in the Funk case "that

¹⁴ *Funk v. Commissioner of Internal Revenue* cannot be taken as indicating that the rules governing notice are coextensive as between

courts will not travel outside a record in order to notice proceedings in another case, . . . , unless the proceedings are put in evidence,"¹⁵ serves to confirm that official notice was properly taken here since the New York State proceedings were brought to the attention of the Board in its proceedings on December 16, 1953, (R. 174) in the form of the Greenberg Opinion (J.A. 32-33). Furthermore, the fact that the former officers were attempting to represent many people, including unknown innocents, in the Board proceedings (J.A. 44-45, 47), made it imperative that the Board consider whether they were the sort who could be expected to behave in the best interests of the innocent. Therefore, the general doctrine of these cases need not control here because "exceptions are admitted, and . . . the extent to which the doctrine will be applied depends to a large degree upon considerations of expediency and justice under the particular circumstances of a case . . .". *Funk v. Commissioner of Internal Revenue*, supra, 163 F. 2d 796,801.

Petitioners' contention that the Board violated Section 7(d) of the Administrative Procedure Act (5 U.S.C. 1006(d)) (Pets. br. 21, 37-38) because they received no advance notice of the Board's intention to take official notice of Judge Greenberg's opinion, were therefore confronted by a "fait accompli", and consequently were not permitted an opportunity to controvert the recitals thereof, fails upon reference to Sec. 7(d) itself. It reads in pertinent part, "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." Obviously, the section envisions that the opportunity for a chance to controvert will be afforded

judicial and administrative proceedings because, even if the Tax Court should be considered as an administrative tribunal it is not, unlike the Board (see Sec. 2 of the Act), of that type referred to in *Isbrandtsen Co. v. United States*, supra, 96 F. Supp. 883, in which the public interest looms large, since its primary concern is the settlement of private differences.

¹⁵ *Funk v. Commissioner of Internal Revenue*, supra, 163 F. 2d 796, 800-801.

subsequent to decision. Otherwise, how could one know upon which "material fact not appearing in the evidence in the record" the decision not yet reached would rest?¹⁶ These people have had ample opportunity to come forward and show the Board that they are not Communist functionaries, but have failed to do so and indeed have never in the course of this proceeding denied the fact.

B. The Former Officers Made No Showing That Their Interests Would Be Substantially Affected as Officers of the IWO

Section 7(h) of the Act provides that if an organization fails to register when ordered to do so, the duty to register it devolves upon the organization's executive officer and secretary (or the individuals performing the usual duties of those offices) and such other officers as the Attorney General may by regulation prescribe. The regulations of the Attorney General impose this duty upon all the principal officers of the organization and all of the members of its governing board (28 C.F.R. 11.205). A violation of Section 7(h) is punishable by a fine not in excess of \$10,000 and imprisonment not in excess of five years for each day that the failure to register continues (See 15(a)).

The Board correctly found that these former officers would not be subject to criminal liability under the provisions of Sections 7(h) and 15(a) of the Act. As indicated above, Section 7(h) and the regulations of the Attorney General thereunder impose this contingent duty to register upon those officers of an organization who are functioning as officers when the duty to register arises.

But these Petitioners are no longer officers of the IWO and have not been since December 15, 1953, when the Superintendent of Insurance, who pursuant to court order was at the time in sole control of the IWO, discharged them from

¹⁶ This view was shared by the Senate Committee which explained: "Where agencies take such notice they must so state on the record or in their decisions and then afford the parties an opportunity to show the contrary." Sen. Doc. No. 248, 79th Cong., 2d Sess. 209 (1946).

their positions as officers. (J.A. 32-33, 65, 66, 67, 68, 69). Under the singular facts in this case, involuntarily and without choice on their part or on the part of the society itself, these former officers ceased to be officers by virtue of the lawful order of a governmental agency. The Superintendent represented to the Board that it was the position of the State of New York under the laws thereof that Petitioners were no longer officers (J.A. 40). Petitioners, failing to find anything equivocal in the Superintendent's statement that they were relieved of titles, duties and everything else (J.A. 65-69), try to do the next best thing by casting doubt on the legality of the Superintendent's action. Petitioners imply that the Board could not reasonably have relied upon the representations of the Superintendent (Pets. br. 40). Apparently the legal effect of the Superintendent's actions and the significance to be ascribed to his representations depends to a very large extent upon whose ox is being gored (See Pets. br. 27, 59). In any event the doubt asserted by Petitioners is apparently not shared by the Appellate Division of the Supreme Court of New York (J.A. 68).

Section 7(h) of the Act has the effect of rendering academic the question whether Petitioners continue to retain their titles as officers. Section 7(h) reads in pertinent part:

"... it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and the secretary (or individual performing the ordinary and usual duties of a secretary) ... to register for such organization ..."

It is undisputed that Petitioners have not been active in the management of the IWO since December 15, 1953. (J.A. 33, 63, 64, 65, 66) (Pets. br. 56). Furthermore, the Superintendent of Insurance made it clear that Petitioners are not now and never will be in a position to furnish any of the information required by the registration statement due to the fact that the Superintendent has or will have exclusive possession of all the records (J.A. 73-75). It is unthinkable that a court would permit Section 7(h), which

amounts to a criminal statute and therefore must be strictly construed, to be applied to these people under the facts at bar. The Attorney General was most careful in the Board proceedings in this case to avoid giving any indication of whom he felt the duty of registering might devolve upon after a final Board order, but he was most emphatic in pointing out that it would have to be someone in active management of the corporation (R. 243). Admittedly Petitioners are not now in active management of this corporation and have not been since December 15, 1953.

C. The Former Members Made No Showing That Their Interests Would Be Substantially Affected

As we have seen, a registration order would not adversely affect or bind the former officers as members because they are no longer members of the IWO, having been relieved of that status by the action of the New York court and by the Superintendent of Insurance.

It is clear, for the same reason obtaining with respect to the former officers, that Ossip and Collins are no longer members of the IWO, and they cannot assert that they would be aggrieved by a registration order against the IWO. For the same reasons Petitioners' claim that a registration order branded them as "second class citizens" and disloyal persons (Pets. br. 44) is likewise erroneous. It is likewise obvious that the former members could not be more adversely affected by this order than was already the case due to the fact that the IWO was found to be Communist controlled by the New York courts (J.A. 32-33).

The Board's action in denying the application of the former members was well within its discretion for the additional reason that the motion was untimely. The affidavit of Petitioner Ossip (J. A. 54-55) indicates personal knowledge of the New York State proceedings wherein the motion of November 30, culminating in the December 15, 1953, opinion (J. A. 32-36), made it abundantly clear that the Superintendent was not going to defend the IWO, so clear that the former officers moved to intervene on the next day on the ground that their interests were not being represented

(J. A. 3). The affidavit of Petitioner Collins presents no independent knowledge but only adopts the assertions of Ossip. So, as these Petitioners knew of the New York proceedings, they ought by the exercise of ordinary due diligence have had knowledge that they were not being represented before the Board. Thus, they were guilty of laches in not moving to intervene until a month and a half later and after the order had been entered. Since these two Petitioners in the exercise of due diligence could have asserted their purported interests prior to the Board decision, it cannot be said that their first occasion to act arose after that decision. *Wolpe v. Poretsky*, 144 F.2d 505 (C.A. D.C.) has been cited by Petitioners as bearing on this issue, but that case holds, at page 508, that intervention may be allowed after a final decree where the right could not otherwise be protected. Furthermore, the case is interpretive of the Federal Rules of Civil Procedure, and although persuasive, is not controlling in administrative proceedings.

In addition, notwithstanding Petitioners' erroneous contention that the Board requires a potential intervenor to "reveal the sources and nature of his evidence" (Pets. br. 47), it does not seem unreasonable, in view of the very large number of potentially interested individuals, for the Board to turn applicants away where, as here, their ability to prove their asserted defenses is doubtful at best and where, as here, applicants are asking that an order previously entered be set aside and a hearing commenced (J. A. 61).

D. Neither Group of Petitioners Indicated That They Intended To Present a Meritorious Defense

Both groups of Petitioners made it clear to the Board that they intended to defend the IWO on the basis that since it had been under the control of the New York State Supreme Court and the Superintendent of Insurance since December of 1950, it could not have been Communist controlled and could not have been operated for the benefit of the Communist Party (J.A. 4-6). The defense they would assert is worthless. It is worthless because the only two

representatives of the Superintendent who appeared before the Board, Mr. Williams and Mr. Henry, both indicated in unmistakable and unambiguous language that it was entirely possible for the subversive activity of the IWO to have continued on every level through the agency of its officers and employees subsequent to the time that the Superintendent took control of the organization.

Thus we have the men in legal control of the IWO presenting the Board with a very clear picture of the nature and limitations of the control exercised by the Superintendent: There was no control exercised or even possible with respect to the actual operating, functional unit of the IWO, the local lodge which to the average member comprised the sum and substance of the organization (J.A. 72); the Superintendent had no way to govern what was happening at the level where subversion posed its greatest threat, e.g., among the hundreds and hundreds of lodges with their tens of thousands of members scattered across the nation (J.A. 73); there was no control of the "fraternal" activity of the IWO at any level (J.A. 72); the Communist leaders of the IWO (J.A. 46-47) were able to do whatever travelling they felt was necessary for the "fraternal" business of the IWO (J.A. 72).

On this record the Board could reasonably have determined that it was possible for the IWO to be directed, dominated and controlled by the Communist Party and operated for the support thereof through the offices of its employees and officers, notwithstanding the receivership, for it was informed by the Superintendent that the subversive activities of the officers and employees of the IWO quite possibly continued during the period of the receivership (J.A. 63).

For the foregoing reasons, since the question of intervention in a Board proceeding is a matter properly within the sound discretion of the Board, it cannot be said the Board's decision in this instance was exercised in an arbitrary or capricious manner.

Furthermore, as heretofore discussed, supra, 39-43, 46-49, neither group of Petitioners could be aggrieved by a registration order against the IWO so as to bring themselves

within the purview of Rule 24(a) of the Federal Rules of Civil Procedure, assuming *arguendo*, that such a right exists under Rule 24(a) in any event.

Petitioners have also contended that the order was not authorized by Section 13(d)(2) because the Board knew the allegations of the Petition to be false (Pets. br. 56-59). But it is clear that this contention is groundless because of the same reasons discussed at p. 49, *supra*, in showing that the proposed defense of both groups of Petitioners was lacking in merit.

Petitioners' cluster of efforts dedicated to portraying the Board's action as illogical and inconsistent (Pets. br. 58-59) fail if the Board did not concede the national office of the IWO to be free of Communist control. The Board never made such a concession.

Indeed, in order to do so, the Board would have had to disregard Mr. Henry's representation that the officers and employees of the IWO (who might still be continuing their subversive activity) may well have carried on their subversive activity during the receivership (J.A. 63) and that of Mr. Williams to the effect that the Communist officers were permitted to travel about in their own discretion on IWO fraternal business as to which the Superintendent could not concern himself (J.A. 72). Actually, by noting that the Superintendent had represented "that there was no method by which any subversive activity could have been detected . . ." (J.A. 50), the Board acknowledged the possibility of subversion. Since we have shown that the Board rightfully refused permission to intervene to both groups of Petitioners, the Petitioners have no standing to litigate whether or not the order here involved is valid.

IV

The Board Was Correct in Ruling That Petitioners Did Not Have Standing To Intervene and Defend the IWO on Behalf of All Other Members of the IWO as a Class

It is well established that an action on behalf of others who are not made parties can be maintained only on the theory of a class action. *Milk Wagon Drivers' Union of*

Chicago, Local 753, et al. v. Associated Milk Dealers, et al., 1941, 39 F. Supp. 671 (D. C., N. D. Ill., E. D.). This attempted intervention on behalf of all the former members of the IWO must be maintained on the theory of a class action if it is to be maintained at all. But the attending facts determine whether an action is a class suit and if the facts do not meet the requirements thereof the designation of it as such cannot cure the defect. *Pacific Fire Insurance Co. v. Remer*, 1942, 45 F. Supp. 703, 708 (D. C., E. D. La., New Or. Div.).

The law is settled that with respect to both the "true" class action of Rule 23(a)(1) of the Federal Rules of Civil Procedure¹⁷ and the "spurious" class action embodied in clause (3) of Rule 23(a), upon both of which Petitioners rely (Pets. br. 48), the same requisites must be met except that in the case of the "spurious" class action the members' interests may be several and not interdependent. *Knowles v. War Damage Corporation*, 1948, 171 F. 2d 15 (C.A.D.C.), certiorari denied, 336 U.S. 914. It is therefore irrelevant for present purposes that Petitioners maintain that they have made their case under both clauses (a)(1) and (a)(3) of Rule 23, since they have failed to meet the factual requirements essential to maintain an action under either clause.

Rule 23(a) in providing that only those "as will fairly insure the adequate representation of all" and the cases thereunder are unanimous in holding that, "There must be a showing of adequate representation of the class, for members of that class are to be bound by the outcome of the action". *Knowles v. War Damage Corporation*, *supra*, 1948, 171 F. 2d 15, 18 (C.A. D.C.); *Hansberry v. Lee*, 1940, 311 U. S. 32, 44-46. This question of whether the class is adequately represented depends upon the facts of the individual case, *Pelelas v. Caterpillar Tractor Co.*, 1939, 30 F. Supp. 173 (S. D. Ill.), but the cases are as one in holding that the

¹⁷ Both groups of Petitioners' rely on Rule 23(a) to maintain their action on behalf of the former members of the IWO (Pets. br. 47-50). We deny, of course, that the Federal Rules of Civil Procedure govern proceedings before the Board.

interests of the person seeking to represent the class must be coextensive with the interests of the remaining members of the class so that his interests do not conflict with the interests of the others. *Kentucky Home Mutual Life Insurance Co. v. Duling*, 1951, 190 F. 2d 797 (C.A. 6); *Clark v. Chase National Bank of City of New York*, 1942, 45 F. Supp. 820 (D. C. S. D. N. Y.); *Gray v. Reuther*, 1951, 99 F. Supp. 992 (D. C. E. D. Mich., S. D.); *United States v. E. I. DuPont De Nemours and Co.*, 1952, 13 F.R.D. 98 (D. C. N. D. Ill. E. D.); *Molina v. Sovereign Camp, W. O. W.*, 1947, 6 F.R.D. 385 (D. C. D. Nebrs. Omaha D.); *Trailmobile Co. v. Whirls*, 1946, 154 F. 2d 866 (C.C.A. 6), reversed on other grounds, 331 U. S. 40.

Furthermore, whether the persons seeking to represent the class possess the ability to insure the adequate representation thereof is a factual question which must be resolved by the trial court within its sound discretion, and that decision is subject only to review for abuse. *Peelias v. Caterpillar Tractor Co.*, *supra*, 1940, 113 F. 2d 629 (C.C.A. 7); *Weeks v. Bareco Oil Co.*, 1941, 125 F. 2d 84 (C.C.A. 7); *Molina v. Sovereign Camp, W. O. W.*, *supra*, 1947, 6 F.R.D. 385, (D. C. D. Nebr. Omaha D.); *Knowles v. War Damage Corporation*, *supra*, 1948, 171 F. 2d 15 (C. A. D. C.).

The factual background of this case shows that the Board did not abuse its discretion in declining to permit Petitioners to intervene and defend the remaining former members of the organization.

A. As to the former officers.

We agree with Petitioners (Pets. br. 50) that adequate representation of the class must be insured and as was pointed out above the interest of the persons seeking to represent the class cannot be in conflict with those of the class but rather must be coextensive therewith. The Board was well within its sound discretion in determining that the interests of the former officers were in conflict with those of the rank and file membership of the IWO (J.A. 45, 48).

In the instant case a small group composed of Communist functionaries and a Communist propagandist (J.A. 46-47),

insist that the Board could not reasonably determine that the conflict of interest between them and the remaining numerous "innocent" members of the class (J.A. 47), rendered it impossible for the Petitioners to represent adequately the innocent. Petitioners say that their interests were identical, ". . . i.e., avoidance of the penalties and disabilities consequent to both upon a registration order". (Pets. br. 49-50).

Their interest in avoiding any disabilities which might result from a registration order¹⁸ might well be identical, but no showing was made that the innocents would desire to defend the IWO, which is the interest at issue here as Petitioners well know. For these disabilities can be avoided by these innocent people without the necessity of them defending the IWO.

Sections 5 and 6 of the Act invoke these disabilities only upon individuals who are members of an organization at the time of the commission of the unlawful act. Certain disabilities would cling to the aliens and recently naturalized citizens referred to in the Ossip affidavit under certain circumstances, so that these people could avoid them only by defending, but the entire class is not and is not claimed to be composed of such individuals (J.A. 54), and no showing is made that any of the petitioners are aliens or recently naturalized citizens.

Since this is so, the Board correctly found a conflict of interests between the unnumbered innocents and the individuals seeking to represent them. In view of this, it was correctly found that these Petitioners could not fairly insure the representation of all interests, and they were therefore rightly excluded from intervening on their behalf. *Kentucky Home Mutual Life Insurance Co., v. Duling*, supra, 1951, 190 F. 2d 797, 802-803 (C. A. 6).

The Board ruled correctly that, in view of the diversity of loyalties within the ranks of the IWO (J.A. 46-47), these Petitioners could not represent the rank and file because

¹⁸ We insist, of course, that for the reasons elucidated, supra, pp. 39-43, 46-49, no one can be hurt by the order involved under the particular circumstances of this case.

they made no showing "that there is a 'class' interest susceptible of such representation." (J.A. 48).

"It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation (citing cases). It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. (Citing cases)" Stone, J., *Hansberry v. Lee*, supra, 1940, 311 U. S. 32, at pages 44, 45.

The Board, in considering Petitioners' motion, rightly considered that the rank and file had no notice of the proposed intervention or of its purported representative character and that the rank and file were not shown to have desired or acquiesced in such representation. Petitioners' comment that "Rule 23 makes no such requirement (as to notice)" (Pets. br. 50), is best viewed in the light of the language of this court in *Knowles v. War Damage Corporation*, supra, 1948, 171 F. 2d 15, 18, (C.A. D.C.), certiorari denied 336 U.S. 914: "Factors bearing upon adequacy of representation are various and are not specifically enumerated in the law. It is pertinent to consider whether other members of the class have notice, express or constructive of the pendency of the action and of its representative character; whether such members desire or acquiesce in such representation; . . ."

Petitioners' attempt to show lack of time as an excuse for not notifying those whom they sought to represent neglects to mention the fact that while they made their motion on

December 16, 1953, the motion was argued on January 4, 1954, (Pets. br. 10, 11) so that Petitioners had at least two and one-half weeks in which to notify the others, if they so chose.

Petitioners' citation of the *Underwood* case, 14 F.R.D. 222, as supporting the proposition that the Board should have held a hearing on the factual question of adequate representation on the part of the former officers (Pets. br. 50), neglects the point that there had already been an eleven week hearing on the same matter in the New York courts (J.A. 32, 45-47).¹⁹

Petitioners' statement that the Superintendent did not intend to represent to the Board that Petitioners could not defend on behalf of the other members (Pets. br. 25, 51) is incorrect as these statements of his representatives indicate: (J.A. 66) "Mr. Henry: . . . They cannot represent it (IWO). They have no authority to represent the members either."

(R. 222) "Mr. Henry: . . . I would like to make it clear that to the extent that Mr. Greene moves to intervene on behalf of the members of the IWO, he, of course, has no authority whatever to do so. . . ."

(R. 229) "Mr. Williams: . . . the position of the Superintendent . . . is that . . . he and he alone is authorized and can appear on behalf of the members of the IWO."

(R. 271) "Mr. Williams: . . . the Superintendent does not recognize the right of anyone else to speak for the IWO or its members."

The sincerity of the position that the Board could not properly rely on the representations of the Superintendent without independent investigation of its own, notwithstanding Petitioners' utter failure to attempt even to rebut the legality of the Superintendent's position is best gauged by reference to the reliance they feel should be accorded

¹⁹ The factual premises upon which rested the Board's decision that the interests of the former officer conflicted with those of the rank and file were a proper subject of official notice as our discussion, *supra*, pp. 43-6, indicates.

his representations with respect to dissolution (Pets. br. 58-59).

Certainly the statements of the Superintendent's representatives, *supra*, that these Petitioners could not represent the rank and file fall within those "Factors bearing upon adequacy of representation (which) are various and are not specifically enumerated in the law. . . ." *Knowles v. War Damage Corporation*, *supra*, 1948, 171 F. 2d 15, 18, (C.A. D.C.).

B. As to the former members

As indicated in our examination of the motion of the former officers, the class sought to be represented, e.g.; the rank and file of the former membership of the IWO, remains composed of those innocents who are now cognizant of the real nature of the IWO, and therefore, do not desire to defend it and those others whose interests could well be found to lie in the delay of a final registration order by whatever tactics available. Therefore, the Board in its discretion correctly found that the former members could not intervene on behalf of the class on the ground that (J.A. 61-62):

1. They did not show that there was "a class susceptible of such representation".
2. They did not show that they "would sufficiently represent the other IWO members as a class".

Petitioners' assertion that the Board erred in considering the representations of the Superintendent's representatives that he alone could act on behalf of the rank and file is based on the fallacious premise that the best interests of the rank and file could be served only by defending the IWO. As we have seen, the Superintendent protected their interests before the Board in the best fashion possible by relieving them of the status of members, (App. 85-6). Furthermore, by refusing to assert a baseless defense on behalf of an organization he knew to be Communist (J.A. 43), so as to delay a final registration order against it, he was acting in their best interests as

members of the community at large. As indicated above, these representations were properly considered by the Board.

V

The Order of the Board Was Not Issued in Violation of the Fifth Amendment

We have shown that Petitioners were rightfully refused permission to intervene and defend the IWO because the IWO was in receivership and because they were excluded by a reasonable exercise of the Board's discretion and that they were rightfully precluded from representing the remaining former members as a class. In the circumstances, there has been no lack of fundamental fairness and there has been no violation of the Due Process clause of the Fifth Amendment.

CONCLUSION

Respondent submits, for the reasons set forth in Argument I, to the effect that the court has no jurisdiction of this cause, that the Petition be dismissed.

Alternatively, Respondent submits that the order of the Board requiring the IWO to register as a Communist-front should be sustained on the basis of Arguments II through V inclusive, because the Board acted correctly in refusing to permit Petitioners to intervene and defend the IWO.

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APPENDIX

STATUTES INVOLVED

A. Internal Security Act

The Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781 et seq., provides in pertinent part as follows:

TITLE I—SUBVERSIVE ACTIVITIES CONTROL

SECTION 1. (a) This title may be cited as the "Subversive Activities Control Act of 1950."

(b) Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.

NECESSITY FOR LEGISLATION

SEC. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious

worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have decided clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attachés of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semidiplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens, who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a

republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

DEFINITIONS

SEC. 3. For the purposes of this title—

(1) The term "person" means an individual or an organization.

(2) The term "organization" means an organization, corporation, company, partnership, association, trust, foundation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term "Communist-action organization" means—

(a) Any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist

foreign government, or the world Communist movement referred to in section 2 of this title.

(5) The term "Communist organization" means a Communist-action organization or a Communist-front organization.

* * * * *

(11) The term "Board" means the Subversive Activities Control Board created by section 12 of this title.

(12) The term "final order of the Board" means an order issued by the Board under section 13 of this title, which has become final as provided in section 14 of this title.

* * * * *

EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

SEC. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that

such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post conspicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

(c) As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9(b) of this title.

DENIAL OF PASSPORTS TO MEMBERS OF COMMUNIST . . ORGANIZATIONS

SEC. 6. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such

organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

(c) As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9 (b) of this title.

REGISTRATION AND ANNUAL REPORTS OF COMMUNIST ORGANIZATIONS

SEC. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses

or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f) (1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

(2) It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organization and of persons who actively participate in the activities of such organization.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as an officer or member of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practicable time after the filing of such registration statement or annual report. Upon written request of any individual so notified who denies

that he holds any office or membership (as the case may be) in such organization, the Attorney General shall forthwith initiate and conclude at the earliest practicable time an appropriate investigation to determine the truth or falsity of such denial, and, if the Attorney General shall be satisfied that such denial is correct, he shall thereupon strike from such registration statement or annual report the name of such individual. If the Attorney General shall decline or fail to strike the name of such individual from such registration statement or annual report within five months after receipt of such written request, such individual may file with the Board a petition for relief pursuant to section 13 (b) of this title.

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

REGISTRATION OF MEMBERS OF COMMUNIST-ACTION ORGANIZATIONS

SEC. 8. (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7 (a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7 (a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsection (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulation prescribe.

KEEPING OF REGISTERS; PUBLIC INSPECTION; REPORTS TO PRESIDENT AND CONGRESS

SEC. 9. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

(1) a "Register of Communist-Action Organizations", which shall include (A) the names and addresses of all Communist-action organizations registered under section 7, (B) the registration statements and annual reports filed by such organizations thereunder, and (C) the registration statements filed by individuals under section 8; and

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection: *Provided*, That the Attorney General shall not make public the name of any individual listed in either such register as an officer or member of any Communist organization until sixty days shall have elapsed after the transmittal of the notification

required by section 7 (g) to be sent to such individual, and if prior to the end of such period such individual shall make written request to the Attorney General for the removal of his name from any such list, the Attorney General shall not make public the name of such individual until six months shall have elapsed after receipt of such request by the Attorney General, or until thirty days shall have elapsed after the Attorney General shall have denied such request and shall have transmitted to such individual notice of such denial, whichever is earlier.

(c) The Attorney General shall submit to the President and to the Congress on or before June 1 of each year (and at any other time when requested by either House by resolution) a report with respect to the carrying out of the provisions of this title, including the names and addresses of the organizations listed in such registers and (except to the extent prohibited by subsection (b) of this section) the names and addresses of the individuals listed as members of such organizations.

(d) Upon the registration of each Communist organization under the provisions of this title, the Attorney General shall publish in the Federal Register the fact that such organization has registered as a Communist-action organization, or as a Communist-front organization, as the case may be, and the publication thereof shall constitute notice to all members of such organization that such organization has so registered.

* * * * *

SUBVERSIVE ACTIVITIES CONTROL BOARD

SEC. 12. (a) There is hereby established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three members of the Board shall be members of the same political party. Two of the original members shall be appointed for a term of one year, two for a term of two years, and one for a term of three years, but their successors shall be appointed for terms of three years

each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and three members of the Board shall, at all times constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to the Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees of the Board, and an account of all moneys it has disbursed.

(d) Each member of the Board shall receive a salary of \$12,500 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment.

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 13 (a) of this title, or by any organization under section 13 (b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 3 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 3 of this title; and

(2) upon application made by the Attorney General under section 13 (a) of this title, or by any individual under section 13 (b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 7 (a) of this title.

(f) Subject to the civil-service laws and Classification Act of 1949, the Board may appoint and fix the compensation

of a chief clerk and such examiners and other personnel as may be necessary for the performance of its functions.

(g) The Board may make such rules and regulations, not inconsistent with the provisions of this title, as may be necessary for the performance of its duties.

(h) There are hereby authorized to be appropriated to the Board such sums as may be necessary to carry out its functions.

PROCEEDINGS BEFORE BOARD

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7 (g) of this title to file a petition for relief may file with

the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiner designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpoena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry. Subpenas may be signed and issued by any member of the Board or any duly authorized examiner. Subpenas shall be issued on behalf of the organization or the individual who is a party to the proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. Witnesses summoned shall be paid the same fees and mileage paid witnesses in the district courts of the United States. In case of disobedience to a subpoena, the Board may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. No person shall be held liable in any action in any court, State or Federal, for any damages resulting from (1) his production of any

documentary evidence in any proceeding before the Board if he is required, by a subpoena issued under this subsection, to produce the evidence; or (2) any statement under oath he makes in answer to a question he is asked while testifying before the Board in response to a subpoena issued under this subsection, if the statement is pertinent to the question.

(d) (1) All hearings conducted under this section shall be public. Each party to such proceeding shall have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness, and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty of misbehavior which obstructs the hearing, such party or counsel may be excluded from further participation in the hearing.

(e) In determining whether any organization is a "Communist-action organization", the Board shall take into consideration—

(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and

(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and

(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of,

any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title; or

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7 (a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served, on such individual an order requiring him to register as such under section 8 of this title.

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the

case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such organization to register as such under section 7 of this title; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such individual to register as such member under section 8 of this title; and send a copy of such order to such individual.

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual reports; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8, as may be appropriate; and send a copy of such order to such individual.

(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for the cancellation of its registration and for relief from the requirement of further annual reports; or

(2) that an individual is a member of a Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order denying his petition for an order requiring the Attorney General (A) to strike his name from any registration statement or annual report on which it appears or (B) to cancel the registration of such individual under section 8, as the case may be.

(k) When any order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14 (b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

JUDICIAL REVIEW

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsection (g), (h), (i), or (j) of section 13 may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and

file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall set aside an order issued under subsection (j) of section 13 it may, in the case of an organization, enter a judgment canceling the registration of such organization and relieving it from the requirement of further annual reports, or in the case of an individual, enter a judgment requiring the Attorney General (A) to strike the name of such individual from the registration statement or annual report on which it appears, or (B) cancel the registration of such individual under section 8, as may be appropriate. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in title 28, United States Code, section 1254.

(b) Any order of the Board issued under section 13 shall become final—

- (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals; or

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than \$10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, willfully

makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than \$10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement willfully made, and each willful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000. Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

SEC. 16. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.

* * * * *

B. Immigration and Nationality Act

Pertinent provisions of sections 22 and 25 of the Act have been carried forward in the Immigration and Nationality Act, 66 Stat. 163, adopted June 27, 1952, 8 U. S. C. secs. 1182, 1251, 1424, 1451, as follows:

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive

visas and shall be excluded from admission into the United States:

* * * * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * * * *

(E) Aliens not within any of the other provisions, of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 241. (a) Any alien in the United States (including any alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be

registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 313. (a) Notwithstanding the provisions of section 405 (b), no person shall hereafter be naturalized as a citizen of the United States—

* * * * *

(2) . . . (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 7 of the Subversive Activities Control Act of 1950; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization.

SEC. 340. * * * (c) If a person who shall have been naturalized after the effective date of this Act¹ shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of

the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

* * * * *

C. The Administrative Procedure Act

Pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 8 U.S.C. 1001 ff., are as follows:

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) Right of Review—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action—The form of proceeding by judicial review shall be by any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * *

* * * * *

(Copy)

NOTICE TO CERTIFICATE HOLDERS WITH THE INTERNATIONAL WORKERS ORDER, INC.

(Under the sole supervision of the Superintendent of Insurance of the State of New York)

Inquiries have been received from certificate holders as to the effect, if any, upon them of the entry on January 14, 1954 of an order by the Subversive Activities Control Board requiring the International Workers Order, Inc. to register as a Communist-front organization.

Please be advised that you are no longer members of the International Workers Order, Inc.

On December 15, 1953 the Superintendent of Insurance pursuant to court order assumed sole supervision of the International Workers Order, Inc. The fraternal organization and all its lodges and subsidiary organizations were dissolved and all officers were discharged. On that date Mr. Justice Henry Clay Greenberg of the Supreme Court of the State of New York ruled that "in legal contemplation the corporate respondent has ceased to exist."

Its charter, however, has continued for the sole purpose of effecting transfer of your certificates of insurance to another insurer. A plan for this transfer has already been submitted to a referee appointed by the Supreme Court of the State of New York. Until that transfer is completed, your status is that of certificate holders with the International Workers Order, Inc. (under the sole supervision of the Superintendent of Insurance of the State of New York).

Continuing to pay your premiums directly to the Superintendent of Insurance at 80 Fifth Avenue, New York 11, N. Y., or otherwise continuing your insurance in force, does not constitute membership in the International Workers Order, Inc. or in a subversive or a Communist-front organization.

You should note, however, that joining or maintaining any connection with any fraternal, cultural, social or other group which has been organized or which may be organized by former officers or leaders of the former International Workers Order, Inc. or any of its lodges or subsidiary organizations may well be considered to be membership in a subversive or a Communist-front organization.

ALFRED J. BOHLINGER,
*Superintendent of Insurance
of the State of New York.*

JANUARY 20, 1954.

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REPLY BRIEF FOR PETITIONERS

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 12,135

DAVE GREENE, RUBIN SALTZMAN, ROCKWELL
KENT, PETER SHIPKA, SAM MILGROM, PAULINE
OSSIP and ZEBEDEE COLLINS,
Petitioners,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

On Review of Order of the Subversive Activities Control Board

JOHN J. ABT,
JOSEPH FORER,
Attorneys for Petitioners.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED SEP 16 1954

Joseph Forer
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United States Court of Appeals
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DAVE GREENE, RUBIN SALTZMAN, ROCKWELL KENT, PETER
SHIPKA, SAM MILGROM, PAULINE OSSIP and ZEBEDEE COLLINS,
Petitioners.

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

On Review of Order of the Subversive Activities Control Board

REPLY BRIEF FOR PETITIONERS

We showed in our main brief that the order under review which, if affirmed, would impose onerous sanctions and disabilities upon both current and former members of the I.W.O., was issued by the Board in violation of the Act, the Administrative Procedure Act and the elementary requirements of due process. We further showed that the order that the I.W.O. register as a "Communist-front" organization was premised on an assumed state of facts that Respondent knew to be false at the time it entered the order (Pet. brief, 56-59).¹ Respondent's brief in substance concedes that the latter was the case. For it states (Respt. brief, 40-41):

"Actually there is no doubt that the I.W.O. as a functioning fraternal organization has been dissolved, existing today solely to effectuate the reinsurance plan.

¹ We designate Petitioner's main brief as "Pet. brief" and Respondent's brief as "Respt. brief".

The Superintendent was placed in sole control of the I.W.O. as a result of a proceeding which has been litigated through the New York State Courts, the Supreme Court of the United States denying certiorari, and the order of sole control was affirmed on appeal (J. A. 32-33)."

Obviously, an organization under the sole control of the Superintendent of Insurance and operated exclusively to effectuate a reinsurance plan cannot conceivably be a "Communist-front" organization within the Act's definition. Yet Respondent defends the order despite the admitted falsity of the factual premise on which it was based. It does so primarily by challenging the review jurisdiction of this Court and by asserting grounds different from and totally inconsistent with those on which the Board rested its order. We examine these arguments in this reply and show them to be without merit. Respondent also reiterates certain of the propositions asserted in the report and the memorandum opinion of the Board which accompanied its orders (J. A. 37, 58). We have answered these contentions fully in our main brief and comment on them only briefly here.^{1a}

I

Respondent's challenge to the jurisdiction of the Court is without merit.

A. The order of the Board was issued after a hearing and hence is reviewable as an order issued under section 13(g) of the Act.

Respondent points out that section 14(a) of the Act limits the review function of this Court to orders issued

^{1a} We do not separately discuss the distortions and misstatements of fact contained in Respondent's counter-statement of the case (Respt. brief, 2-13) since these are dealt with in the course of our argument.

under section 13(g), (h), (i) or (j). It argues that since the Board designated its order as one issued under section 13(d)(2), this Court is without jurisdiction to entertain a petition for review (Respt. brief, 18-22).

However, as we pointed out in our main brief (p. 60, n. 33) the Board cannot oust this Court of jurisdiction by mislabelling its order. In fact, the order was issued under section 13(g). That section provides that, "If, after a hearing upon a petition filed under subsection (a) of this section", the Board determines that an organization is a "Communist-front" organization, it shall make a report and issue an order requiring the organization to register as such. In this proceeding, there were protracted hearings before the Board upon the petition. These included hearings upon the motions of the I.W.O. to dismiss the petition on constitutional grounds and for failure to conform to the requirements of the Act (J. A. 37; R. 386-96) as well as hearings upon the motions of the Petitioners.²

Respondent argues, however, that an order is issued pursuant to section 13(g) only where there has been a hearing for the receipt of evidence (Respt. brief, 18). The short answer to that contention is that section 13(g) does not limit the hearing referred to therein to a hearing on the facts, but simply speaks of "hearing" generally.

Moreover, the limitation which Respondent attempts to read into section 13(g) would lead to an absurd result. It would prevent an accused organization from standing on a motion to dismiss a petition on constitutional and statutory grounds, except at the price of foregoing its right of review in this Court under section 14. Obviously this was not the intention of the authors of the Act. "There is a presumption against a construction which would render a statute ineffective or inefficient. . . .' It would require

² The transcript of these hearings occupies 348 pages of the typewritten record (R. 1-348), exclusive of briefs and memoranda filed by the parties.

a statute susceptible of no other possible interpretation to persuade us to adopt such a construction in the present case. In order to safeguard the great values of administrative procedure it is necessary to avoid extremes of administrative absolutism." *Yankee Network v. Federal Communications Commission*, 71 App. D. C. 11, 107 F. 2d 212, 219-20.

The place of section 13(d)(2) in the scheme of the Act is clear. Its function is simply to relieve the Board of the necessity of taking evidence where no one appears to contest the facts alleged in the petition. Of course, where an accused organization fails to appear and interpose any defense whatsoever on the law or the facts, and there is no application for intervention, there is nothing for this Court to review, and section 14 is obviously inapplicable. Where as here, however, the accused organization interposed a legal defense and applicants for intervention presented issues of law and fact, all of which were heard by the Board, the order of the Board was issued "after hearing" as contemplated by section 13(g) and hence is reviewable by this Court under section 14.³

B. Petitioners, as persons entitled as of right to intervene in the administrative proceeding, are aggrieved parties within the meaning of section 14.

In our main brief (pp. 27-47) we showed that the Petitioners were persons "entitled as of right" to intervene in the administrative proceeding within the meaning of section 2(b) of the Administrative Procedure Act and hence were "parties" to the proceeding as that term is defined by section 2(b). We further showed (pp. 59-60) that as parties to the administrative proceeding, they are also parties aggrieved by the order of the Board within the meaning

³ Furthermore, as we showed in our main brief (pp. 55-59), section 13(d) does not authorize the issuance of a default order in the circumstances of this case, and the order under review could not, therefore, have been issued pursuant to that section.

of section 14 of the Act, and therefore are entitled to petition this Court to review the Board's order.

Respondent, however, contends that in no case is intervention in a proceeding before the Board a matter of right (Respt. brief, 34-38). From this, it concludes that Petitioners were not parties to the administrative proceeding or parties aggrieved within the meaning of section 14.

Respondent's premise is fallacious. None of the cases it cites (Respt. brief, 35) is in point since all were decided prior to the enactment of the Administrative Procedure Act which, as we showed in our main brief (pp. 27-28) is the source of the right to intervene in proceedings under the Act. Respondent attempts to dispose of section 2(b) of the Administrative Procedure Act with the assertion that it makes intervention a matter of right only where the particular statute or agency rules confer that right. (*Ibid.*) But section 2(b) is not, in terms, so limited. To read such a limitation into that section would render it entirely redundant. It is obvious that section 2(b) was intended to and does make intervention a matter of right in all agency proceedings whenever the applicant makes a showing that would entitle him to intervene under the applicable principles of procedure. Those principles have now been codified in Rule 24(a) of the Federal Rules of Civil Procedure.

Respondent's present position that there is no right to intervene before the Board and that Rule 24(a) is inapplicable is not only fallacious but directly contradictory to the position taken by it in the report of the Board. Respondent stated in its report (R. 48-49):

"This brings on for consideration whether or not applicants may intervene as of right as five individual members of the [I.W.O.]. As applicant's counsel asserted, this requires a showing that their interest is or may not be adequately represented and that they are or may be adversely affected by an order of registration against the [I.W.O.]."

Thus, Respondent conceded in its report that there is a right to intervene in proceedings before the Board and that the presence of that right is to be determined by the criteria of Rule 24(a).⁴

Respondent's original position on this issue was correct and the after-thought it now asserts is plainly erroneous.⁵

Since the Administrative Procedure Act establishes a right to intervene in proceedings before the Board and since, as we showed in our original brief, Petitioners had and properly asserted that right, they are aggrieved parties within the meaning of section 14 and, as such, entitled to prosecute a petition for review in this Court.

C. The jurisdiction of this Court is established, independently, by section 10 of the Administrative Procedure Act.

For the purpose of this discussion we assume, arguendo, that there is no right of intervention in proceedings under the Act, but as urged by the Respondent (pp. 34-35) that the allowance of intervention rests in the sound discretion of the Board, and hence that Petitioners were not "parties" to the administrative proceeding.

For all of the reasons urged in our original brief, Respondent's denial of Petitioners' motions to intervene (if not a violation of right) was a clear abuse of discretion. Hence, Petitioners are "persons" aggrieved by agency action, and therefore entitled to judicial review of such action by virtue of section 10(a) of the Administrative Pro-

⁴ Counsel for the Attorney General (who appear here on behalf of the Board) opposed the motion of the officers-Petitioners on the ground that they had failed to comply with the notice requirement of Rule 24(c) (R. 253; Pet. brief, 29).

⁵ The logic of Respondent's present position is that the allowance of intervention rests in the absolute discretion of the Board. For it asserts that the conditions governing intervention are matters to be prescribed by the Board in its regulations, and concedes that the regulations are silent on the subject (Respt. brief, 34).

cedure Act. Section 10(b) of that Act provides that such judicial review "shall be any statutory review proceeding *relevant to the subject matter* in any court specified by statute." (Emphasis supplied.)

The subject matter of the present review proceeding is an order of the Board which, as we have shown above, was issued pursuant to section 13(g) of the Act. Section 14 of the Act provides for the review of such orders by this Court. The review procedure of section 14 is therefore "relevant to the subject matter" of this proceeding and is available to petitioners as aggrieved "persons" even if they should be held not to be aggrieved "parties," within the meaning of section 14.⁶ This result is not only required by a literal reading of section 10 but by the purpose of the Administrative Procedure Act which counsels "a judicial attitude of hospitality towards the claim that section 10 greatly expanded the availability of judicial review." *Heikkila v. Barber*, 345 U. S. 229, 232.

II

Petitioners' right to intervene was not barred by the New York liquidation proceeding against the I.W.O.

Respondent contends that, in moving to intervene and defend the proceeding before the Board, Petitioners were seeking to exercise a derivative right only, and that since the I.W.O. was in the possession of the Superintendent of Insurance pursuant to an order of the New York Court, Petitioners were barred from exercising that right without the consent of that court.

⁶ Respondent's argument that section 10 of the Administrative Procedure Act is inapplicable is based on the premise that the order of the Board was issued pursuant to section 13(d) of the Act and hence is not reviewable under section 14 (Respt. brief, 23-24). As we have shown above, that proposition is fallacious, and Respondent's conclusion falls with its premise.

The short answer to this contention is that it was not asserted by the Board as a ground for denying intervention.⁷ The Board treated Petitioners' motions for leave to intervene as the assertion of a primary right to defend themselves and the other members of the I.W.O. against the sanctions and disabilities which a registration order would impose upon them. It denied intervention primarily on the ground that Petitioners would not be harmed by such an order (R. 48-50; 62).

Since, as we showed in our main brief, the grounds on which the Board denied intervention and predicated its order were erroneous, the order could not be rescued even if the contention now advanced by Respondent were valid. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its [the agency's] action is based . . . an administrative order cannot be upheld unless the grounds on which the agency acted in exercising its power were those upon which its action can be sustained." *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 87, 95. To the same effect: *Federal Power Commission v. Idaho Power Co.*, 344 U. S. 17, 20; *Mississippi River Fuel Corp. v. Federal Power Commission*, 82 App. D. C. 208, 163 F. 2d 433; *Democrat Printing Co. v. Federal Communications Commission*, 91 App. D. C. 72, 202 F. 2d 298; *Capital Transit Co. v. Public Utilities Commission*, App. D. C., No. 11501, decided Dec. 10, 1953, slip copy, p. 25.

Furthermore, and even assuming that the rights which Petitioners asserted were exclusively of a derivative character, Respondent's contention is palpably fallacious.

Respondent charges Petitioners with attempting to "circumvent the will" of the New York court by their motions to intervene (Respt. brief, 28, 29). It is plain, however, that

⁷ Nor was it suggested to the Board by counsel for the Attorney General. (See Pet. brief, 28-29, for a summary of the Attorney General's objections to Petitioners' motions.)

it was not the Petitioners but the Board which flouted that court. In his opinion of December 15, 1953, Justice Greenberg stated that the Board's denial of his request for a 90 day adjournment of the proceeding and its threat to enter a default registration order against the I.W.O. "would seem to present an intolerable situation, and *yet it is the end result of the refusal of the Board to recognize orderly procedure in this jurisdiction and accord the State of New York the recognition it is entitled to on the basis of comity*" (R. 36). (Emphasis supplied.)

The New York court's refusal to authorize the I.W.O. officers' request for funds with which to retain counsel to defend the organization before the Board was not based on a belief that there was no meritorious defense to the Attorney General's petition. On the contrary, the court was of the opinion that since the issue before the Board was the current character of the I.W.O., the fact that the Superintendent of Insurance was currently in sole control of the organization was a complete defense to the charge of Communist domination and control (R. 34). The sole ground for the court's denial of the motion was that, in legal contemplation, the I.W.O. had ceased to exist "and therefore may no longer be represented by counsel of its own choice" (R. 36).

Far from circumventing the court, therefore, Petitioners' motions for leave to intervene were efforts on their part to present to the Board a defense to the proceeding which the New York court regarded as controlling and to rectify what that court had characterized as "an intolerable situation."

The cases cited by Respondent in support of its contention are beside the point. *Porter v. Sabin*, 149 U. S. 473 (Respt. brief, 29-30) simply stands for the familiar proposition that neither a corporation nor its receiver may be sued without the consent of the court which appointed the

receiver.⁸ Far from supporting Respondent's contention, this decision confirms the grounds on which Judge Greenberg denounced the Board and indicates that the Attorney General's petition was improper in the first instance because filed against the I.W.O. without the consent of the New York Court. The remaining cases cited by Respondent (pp. 30-32) were suits by stockholders to recover monies allegedly due the corporation and involve questions as to the legal title to the claims and other issues not remotely relevant here.

It is clear, therefore, that the New York proceeding would not inhibit Petitioners' intervention in the administrative proceeding, even if the rights they sought to assert were exclusively of a derivative character. But Petitioners' motions had a second aspect. Petitioners not only asserted a derivative right to defend the I.W.O., but a primary right to defend themselves against the sanctions and disabilities which the Act would impose upon them as automatic consequences of the registration order.⁹ Plainly, the New York proceeding could not bar them from asserting this primary right. Counsel for the Superintendent conceded as much when he stated (R. 307):

"... I don't think that Judge Greenberg's order enjoins an individual from appearing in this proceeding or any other proceeding and defending on his own behalf."

For all of the foregoing reasons, it is clear that the pendency of the New York proceeding presented no bar to Petitioners' application for intervention.

⁸ The decision emphasizes (p. 480) that observance of this rule is of special importance where the receiver was appointed by a state court and the suit against him or the corporation is filed in a federal court.

⁹ It is because Petitioners' motions presented this double aspect that, as motions on behalf of the entire class of I.W.O. members, they made out a case for intervention under clause (2) as well as clause (1) of Rule 23(a) of the Federal Rules of Civil Procedure. (See Pet. brief, 47-48.)

III

Respondent's contention that Petitioners are no longer members of the I.W.O. and therefore will not be harmed by a registration order was not asserted by the Board as a ground for its decision and is directly contrary to the ground on which the Board based its order.

Respondent contends (pp. 39-41) that Petitioners are no longer members of the I.W.O. and that since the sanctions of sections 5 and 6 of the Act (with reference to federal employment and passports) apply only to current members, Petitioners are not subject to these sanctions and hence will not be harmed by the registration order.

To support its present contention that Petitioners are no longer members of the I.W.O., Respondent refers to a notice dated January 20, 1954 from the Superintendent of Insurance addressed to "Certificate Holders with the International Workers Order, Inc." (Respt. brief, 40, 85-87). As appears from the text of this notice (Respt. brief, 85-87) it was in effect a legal opinion of the Superintendent that all membership in the I.W.O. had been terminated in consequence of the December 15 order of the New York court vesting the Superintendent with sole control of the organization, the dissolution of the fraternal organization, its lodges and subsidiaries, and the continuance of the corporate charter solely for the purpose of effecting re-insurance.¹⁰

Respondent seems to charge Petitioners with concealing the contents of this notice from the Board and posing as members when they had reason to know that their status

¹⁰ Respondent suggests that, by this notice, the Superintendent "relieved" Petitioners of the status of members (Respt. brief, 40, 57). But it is clear from the text of the notice that it was simply an opinion of the Superintendent that, in consequence of the developments enumerated therein, membership in the I.W.O. had terminated.

as such had ended (Respt. brief, 40). The fact is, however, that at the hearing of January 4, 1954, the Superintendent informed the Board that, in his view, membership in the I.W.O. had terminated and of the facts on which that opinion was based. Thus, counsel for the Superintendent stated (R. 261):

“. . . the [I.W.O.] is still alive today, but for one purpose and one purpose only, and that is to effect the reinsurance of the individuals *who were formerly members of the International Workers Order* and who hold insurance policies.” (Emphasis added.)

Counsel for the Superintendent further advised the Board that all I.W.O. lodges had been dissolved as of December 15, 1953 (J. A. 74; R. 272) and that his appearance before the Board was on behalf of the Superintendent, “As the sole supervisor of the International Workers Order, which in our view is now dead except that it is being kept alive for a few weeks in order to transfer the insurance to a commercial carrier” (R. 233). The Board also had before it the December 15 opinion of Justice Greenberg (quoted in the notice from the Superintendent) that “in legal contemplation the [I.W.O.] has ceased to exist” (J. A. 36).

The Board, however, rejected the opinion of the New York court and the Superintendent that the I.W.O. was legally dead and therefore could no longer have members. Its report and memorandum opinion treated both the officer-Petitioners and the member-Petitioners as current members of the I.W.O. (J. A. 45, 61-62). It did not deny intervention on the grounds now urged by Respondent that the sanctions of sections 5 and 6 were inapplicable to the Petitioners, but on the grounds that these sanctions, although applicable, would not harm Petitioners (J. A. 49-50, 62).

Furthermore, the theory which Respondent now asserts as a bar to intervention flatly contradicts the grounds on which it rested its registration order. As the report of the

Board states, Respondent issued its order that the I.W.O. register as a "Communist-front" on the supposition that I.W.O. lodges were still functioning and had members engaged in subversive activity (J. A. 50; Pet. brief, 57-59). Obviously if the Respondent had acted on the proposition it now asserts that the I.W.O. had neither lodges nor members but existed under the sole control of the Superintendent "solely to effectuate the reinsurance plan" (Respt. brief, 41) it could not conceivably have ordered the I.W.O. to register as a "Communist-front" organization.

In our main brief (pp. 30-47), we showed that the grounds on which the Board rested its denial of intervention were patently erroneous. Obviously, its order cannot be saved on grounds which it not only failed to assign but which are the exact opposite of the grounds on which it based its action. *Securities and Exchange Commission v. Chenery Corporation*; *Federal Power Commission v. Idaho Power Co.*; *Mississippi River Fuel Corp. v. Federal Power Commission*; *Democrat Printing Co. v. Federal Communications Commission*; *Capital Transit Company v. Public Utilities Commission*; all *supra*, p. 8.¹¹

¹¹ Respondent's brief not only contradicts the report, order and memorandum opinion of the Board, but is self-contradictory. When Respondent argues that Petitioners have no right to intervene, it states that the I.W.O. has been shorn of its members and lodges and is defunct except for the effectuation of re-insurance (Respt. brief, 40-41). But when it argues that there was a factual basis for the order requiring the I.W.O. to register as a "Communist-front", it urges that the Board was warranted in assuming that "the hundreds and hundreds of lodges with their tens of thousands of members" were currently engaged in subversive activity (Respt. brief, 50).

IV

The other grounds urged by Respondent for denying Petitioners' motions to intervene are patently fallacious.

A. As to the member-Petitioners.

Respondent's brief abandons all but two of the grounds which its memorandum opinion (J. A. 61-62) assigned for denying intervention to the member-Petitioners. It reasserts the contention that the member-Petitioners were guilty of laches (Respt. brief, 48-49.) We examined that contention in our main brief (pp. 45-46) and showed that it was frivolous. In addition to the arguments made there, it is clear that since the officer-Petitioners' motion to intervene was filed on behalf of all I.W.O. members as a class, the time within which the member-Petitioners' might file their motion did not start to run until the officer-Petitioners' motion was denied on January 14, 1954 (J. A. 51). *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 489. The two-week interval between that date and the filing of the member-Petitioners' motion (J. A. 58) could not conceivably constitute laches.

Respondent also reasserts (p. 49) the argument that the member-Petitioners did not establish their ability to prove the defense they asserted: i.e., that the I.W.O. could not be a "Communist-front" inasmuch as it was under the sole control of the Superintendent for the exclusive purpose of effectuating reinsurance (J. A. 54). In our main brief (pp. 46-47) we characterized this contention of the Respondent as preposterous. It becomes even more preposterous in the face of the statement in Respondent's brief (pp. 40-41) that, "Actually there is no doubt that the I.W.O. as a func-

tioning fraternal organization has been dissolved, existing today solely to effectuate the re-insurance plan.”¹²

B. As to the officer-Petitioners.

Respondent's brief (pp. 41-43) reiterates the argument contained in the report of the Board that the officer-Petitioners will suffer no harm from a registration order because—as alleged Communists or Communist sympathizers—they already are subject to or “in jeopardy of” the denial of federal employment and passports, under existing departmental regulations. We examined that argument at length in our main brief and showed that, even assuming the validity of the factual premise on which it was based, it was entirely fallacious as a matter of law (Pet. brief, 30-36). Respondent fails to answer the points which we made in our main brief, and its discussion adds nothing to what was said in the report of the Board.

The Respondent cites three National Labor Relations Board cases (pp. 42-43) in support of its proposition that the injuries to the officer-Petitioners from a registration order are not sufficiently serious to require the granting of their motion to intervene. These cases are completely inapposite. The two Supreme Court decisions to which Respondent refers simply hold that persons not bound by an order of the Labor Board are not necessary parties to the administrative proceeding. In *National Licorice Company v. National Labor Relations Board*, 309 U. S. 350, the Court was careful to emphasize (at 365) that the Board order “does not foreclose the employees from taking any

¹² On August 5, 1954, the New York Supreme Court entered an order approving a reinsurance plan and providing for the liquidation of the I.W.O. as of August 31, 1954. An appeal from this order has been taken to the New York Supreme Court, Appellate Division. In lieu of an application by the appellant for a stay of the order pending appeal, the parties have stipulated that the *status quo ante* shall be restored in the event the order appealed from is reversed.

action to secure an adjudication upon the contracts, nor prejudice their rights in the event of such adjudication." And in *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, the Court pointed out (at 155) that the Board's order did not run against the absent company union and "leaves the Union's private rights untouched." In the instant case, however, a registration order concludes the rights of the officer-Petitioners since, under the terms of the Act, it automatically bars them from federal employment and passports and conclusively determines their criminal liability for conduct which the Act prohibits to members of "Communist-front" organizations. (See Pet. brief, 30-31.)¹³

Respondent also cites the decision of this Court in *Bailey v. Richardson*, 86 App. D. C. 248, 182 F. 2d 46, 57, for the proposition that federal employment privileges are not protected by due process. That decision was affirmed without opinion by an equally divided Court, 341 U. S. 918 and, insofar as the due process question is concerned, appears contrary to later Supreme Court decisions. *Wieman v. Updegraff*, 344 U. S. 183; *Adler v. Board of Education*, 342 U. S. 485; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. (See Pet. brief, 53-55.)

In our main brief (pp. 36-38) we showed that the factual premises on which the Board based its ruling against the officer-Petitioners (i.e., that four of them were active Communists and the fifth a Communist sympathizer) had no foundation in the record, were not proper subjects for official notice, and were noticed by the Board in violation of section 7(d) of the Administrative Procedure Act. We are confident that the Court will not be impressed by Respond-

¹³ The third case cited by Respondent, *National Labor Relations Board v. Star Pub. Co.*, 97 F. 2d 465, does not have the remotest relevance to the issue here. There (at 469) the court upheld the Labor Board's denial of intervention to employees who had been discriminated against and whom the Board ordered reinstated with back pay.

ent's reply (pp. 43-46) which extols the virtues of a star-chamber administrative procedure under which the agency is entitled to base its decision on "official notice" of any matter it cares to, without limitation, and without giving notice to the parties of the matter outside of the record on which it may rely.¹⁴

C. As to class representation.

1. BY THE OFFICER-PETITIONERS.

Respondent concedes that the officer-Petitioners and the members they sought to represent as a class have an identity of interest in the avoidance of the disabilities consequent to all members upon a registration order (Respt. brief, 54). It asserts, however (*ibid.*), that the rank and file members can avoid these disabilities "without the necessity of them defending the I.W.O."—i.e., notwithstanding the entry of a registration order against the I.W.O. However, the very next paragraph of Respondent's brief flatly contradicts this assertion and demonstrates its falsity. For Respondent concedes that the members can escape the sanctions of sections 5 and 6 of the Act only by resigning from the I.W.O. and thus surrendering the benefits of membership, including its insurance feature. Respondent further concedes that in the case of non-citizens and newly naturalized citizens, there can be no escape from the Act's harsh sanctions, since these are applicable to former as well as current members, and therefore "these people could avoid [the sanctions] only by defending the administrative proceeding" (*ibid.*).

Respondent seems to intimate that the officer-Petitioners cannot represent those members of the class who are non-

¹⁴ Respondent suggests (pp. 45-46) that the only remedy for the latter abuse is for the party aggrieved to apply for a rehearing in which he might have an opportunity to controvert the matters on which the agency based its decision. In addition to all other difficulties that this suggestion entails, the regulations of the Board make no provision for a rehearing.

citizens or recently naturalized, since it does not appear that any officer-Petitioner occupies that status. It is plain, however, that the rights of the members of the class for which protection is sought need not be identical so long as "there is a common question of law or fact affecting the several rights and a common relief is sought". Rule 23(a)(3), Federal Rules of Civil Procedure. And see, *McDaniel v. Board of Public Instruction*, 39 F. Supp. 638, 641; *Parker v. Lester*, 112 F. Supp. 433, 439.

Respondent reiterates the contention contained in the report of the Board that it was the position of the Superintendent that the officer-Petitioners were barred by the New York proceeding from representing the members as a class (Respt. brief, 56). As we showed in our original brief (p. 51) this contention is unfounded in fact. And as we have shown, *supra*, pp. 7-10, it is erroneous as a matter of law.

Respondent cites *Hansberry v. Lee*, 311 U. S. 32, apparently to support its argument that the officer-Petitioners did not adequately represent the members as a class (Respt. brief, 55). But, as Respondent's quotation from that decision states, the purpose of the adequate representation rule is to provide due process protection to the absent members of the class who will be bound by the judgment in the action. As we showed in our main brief (pp. 50-51), Respondent invoked this rule only to pervert its purpose by using it as a pretext for an order which concludes the rights of the entire class in the absence of any representation whatsoever.¹⁵

2. BY THE MEMBER-PETITIONERS.

Respondent asserts that the I.W.O. members are not a class susceptible of class representation because it specu-

¹⁵ Respondent's contention (pp. 55-56) that the officer-Petitioners were obliged to notify the I.W.O. members of their intention to apply for class intervention is fully answered in our main brief (pp. 50-51).

lates that some members do not desire to defend the I.W.O. while others "could well be found" to have an interest in delaying the entry of a registration order (Respt. brief, 57). We simply do not understand this gibberish. In any event, as we showed above, Respondent concedes that all the members have an identity of interest in avoiding the sanctions and disabilities which a registration order would entail.

Respondent also argues that the Superintendent acted in the best interests of the members "by refusing to assert a baseless defense" on behalf of the I.W.O. (Respt. brief, 57). This is arrant nonsense. Obviously, the Superintendent did not protect but prejudiced the interests of the members by failing to oppose a default order the effect of which was to deprive the members of valuable rights and privileges. Furthermore, as we have shown above and in our main brief (p. 57), neither the Superintendent nor the New York court considered the defense asserted by the member-Petitioners to be "baseless". On the contrary, they believed it to be a complete defense to the petition. Indeed, that opinion is now shared by Respondent which, as we have seen, in substance concedes that the I.W.O. was not a "Communist-front" at the time the order was entered requiring it to register as such (Respt. brief, 40-41).

CONCLUSION

The Act vests the Subversive Activities Control Board with broad powers over the rights, liberties and reputations of organizations and their members. The sweep of these powers has recently been greatly expanded by the Communist Control Act of 1954. In the present posture of this case, we do not reach the large constitutional questions which these statutes present. Our concern is only that the Board's vast powers be exercised in conformity with the minimum requirements of due process, recognized stand-

ards of administrative procedure and fair play. The Board has crassly violated all of these requirements in this proceeding. The order under review was based on a factual premise known by the Respondent to be false. It is obvious that this order, requiring the registration of an organization that is kept alive under judicial supervision solely to effectuate a reinsurance plan, can serve no possible purpose. Moreover, as Respondent seems to concede (pp. 46-48), there is no one against whom the order can be enforced. Thus the sole purpose of the order was vindictively to fasten severe sanctions and disabilities upon the 100,000 current members of the I.W.O. and, as Respondent concedes, countless thousands of former members as well, without giving them an opportunity to defend themselves.

The order of the Board should therefore be set aside, and, for the reasons stated in our main brief (p. 61), there should be no remand of the proceeding.

Respectfully submitted,

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